United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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9-25-70
(5)

975

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTIRCT OF COLUMBIA CIRCUIT

No. 23,932

BETTY JOE BOWMAN,
Executrix of the Estate of
James L. Bowman, Deceased,
Appellant,

v.

REDDING AND CO., INC., and
ANTHONY IZZO AND CO., INC.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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PLAINTIFF'S PRE-TRIAL STATEMENT

As to Defendant, Anthony Izzo Co., Inc., only:

Negligent signals and instructions regarding operation of the hoist on March 9, 1964, by Leonard Williams, laborer and employee of defendant, Anthony Izzo Co., Inc.

Negligent operation of the hoist on March 9, 1964, by Robert Lee Humphrey, hoist operator and employee of Redding & Co., Inc., who was performing work for the brick sub-contractor, Anthony Izzo Co., Inc., at the time of the death of plaintiff's intestate and was, thus, a "borrowed servant".

* * *

As to Defendant, Redding & Co., Inc., only:

Negligent operation of the hoist on March 9, 1964, by Robert Lee Humphrey, hoist operator and employee of Redding & Co., Inc.

* * *

PRE-TRIAL ORDER

As to Defendant Izzo Co. only:

Negligent signals and instructions regarding operation of the hoist on March 9, 1964, by Leonard Williams, laborer and employee of D. Izzo Co.

Negligent operation of hoist on March 9, 1964, by Robert Lee Humphrey, hoist operator and employee of Redding Co., Inc., who was performing work for the brick subcontractor, Izzo Co., at the time of the death of decedent and was thus a "borrowed servant".

* * *

As to Defendant Redding Co., Inc. only:

Negligent operation of hoist on March 9, 1964, by Robert Lee Humphrey, hoist operator and employee of Redding Co., Inc.

EXCERPTS FROM TRANSCRIPT

[7] MR. FURLOW: "On March 9, 1964, defendant Redding & Company, a corporation, was the general contractor for the erection of an office building at 1025 Vermont Avenue, Northwest, in the District of Columbia. Defendant Anthony Izzo Company, Inc., a corporation, was the masonry sub-contractor."

* * *

"Harold Vinge, doing business as Vinge Company, [8] third party defendant, was a sub-contractor on the job performing window caulking.

"At the back of the building, there are—there was—a hoist erected by defendant, William Enterprises, Inc., which was used by defendant Izzo and defendant Redding.

"Said hoist was operated from a shed where the operator remained, following directions given by other persons on the job.

"On March 9, 1964, the person in the shed was one R. H. Humphrey, who was compensated by Redding Company. On March 9, 1964, plaintiff's decedent, James L. Bowman, an employee of third party defendant Vinge, employed to perform window caulking, fell from about the twelfth floor of said building in the shaft of the hoist, sustaining injuries resulting in his death on that day.

"The hoist was a double-drawn hoist, one side of which was used by defendant Izzo to lift its material, and the other side of which was used by the general contractor Redding. At about the time of decedent's accident, a portion of the hoist which was in use was the half used by defendant Izzo.

"Plaintiff, Betty Jo Bowman, now remarried, is duly appointed and qualified as administratrix of the estate of James L. Bowman, deceased, Administration Number 112865 in this Court."

[9] Those facts have been stipulated to.

* * *

ERNST TONSTAD

* * *

BY MR. BENNETT:

Q. Now, Mr. Tonstad, please speak loudly and slowly so His Honor and the ladies and gentlemen of the jury can hear you.

[10] Please state your full name and address. A. Ernst Tonstad. 5128 Chown Avenue, Alexandria, Virginia.

Q. And your age, sir? A. Forty-five.

Q. And your employment. How are you employed? A. Self-employed.

Q. Self-employed. In what capacity? A. As a caulking company and real estate company.

Q. You own your own company? A. I do.

Q. Now, directing your attention to the month of March, 1964; were you employed at that time? A. Yes, I was.

Q. With whom were you employed? A. Vinge Company.

Q. And who was the owner of that company? A. Harold Vinge.

* * *

[11] Q. In what capacity were you employed; What was the title that you had? A. How far do you want me to go back?

Q. Back in 1964. A. I was foreman.

Q. Okay.

Could you explain to the ladies and gentlemen of the jury what a window caulker does? A. He caulks the windows on the outside up against masonry.

Q. Pardon? A. He caulks around the perimeters of the windows up against the masonry.

Q. You said it was done on the outside? A. The outside of the windows.

Q. Now, back in March of 1964, did you know a man by the name of James L. Bowman? A. I did.

Q. For how long a period of time had you known him? A. About eighteen months.

Q. Eighteen months.

In what capacity did you know him. What was [12] the nature of your association? A. He was working for the Vinge Company.

Q. And did you have occasion to work with Mr. Bowman? A. I did.

Q. For how long a period of time prior to March, 1964, did you do work with Mr. Bowman? A. Well, that would be—have to be off and one.

Q. For how long a period of time? A. That I don't remember.

Q. What was Mr. Bowman's position, to your knowledge, with the Vinge Company? A. He was a caulker apprentice.

Q. How long, do you remember, had he been employed with Mr. Vinge? A. Approximately eighteen months.

Q. What is the distinction between an apprentice caulker and a mechanic caulker, Mr. Tonstad? A. Well, you serve an apprenticeship before you become a mechanic.

Q. Is this like any other trade? A. That's correct.

Q. For how long a period of time had he served as an apprentice caulker? A. Eighteen months.

[13] Q. Do you know of your own personal knowledge whether Mr. Bowman had worked by himself on the job? A. I'm pretty sure he had, yes.

Q. Had he also worked with you? A. Yes.

Q. To your knowledge, was Mr. Bowman a regular employee or a full-time employee of your company—of Mr. Vinge's Company? A. Well, in construction, there is no such a thing as a "full-time." It's by the hour.

Q. By the hour? A. That's correct.

Q. But was he regularly employed by Vinge Company? A. That's correct.

Q. Did you have occasion prior to March, 1964, to supervise Mr. Bowman? A. Yes.

Q. Can you tell the ladies and gentlemen of the jury, to your knowledge, whether or not Mr. Bowman was a qualified apprentice caulker? A. He was.

Q. And if he were not qualified, would he have been able to work by himself? A. No.

Q. Can you tell the ladies and gentlemen of the [14] jury anything that you know, to your knowledge, about Mr. Bowman's interest in his job? A. What do you mean by "interest"?

Q. Enthusiasm. A. He was enthusiastic about his job, yes.

Q. Now, directing your attention to March 9, 1964, did you have occasion to see Mr. Bowman in the morning of that day? A. Yes, I did.

Q. Where did you see him? A. On Seventheenth and I.

Q. Northwest? A. That's right.

Q. And in the District of Columbia? A. That's correct.

Q. Now, approximately what time did you meet him that morning? A. About 7:30.

Q. A.M.? A. Yes, sir.

Q. Do you remember which day of the week it was? A. No.

Q. Would it have been a day—a work day? A. Pardon?

Q. Would it have been a day Monday through Friday, a . . . [15] A. Yes.

Q. . . . work day? A. Yes.

Q. And why did you meet Mr. Bowman at Seventeenth and I Street that morning? A. He had a job there.

* * *

Q. And you met him at 7:30 that morning. What happened? What transpired? A. It had been raining the day before and we could not work on Seventheenth and I.

Mr. Bowman was sent over to Vermont Avenue.

Q. Who was he sent over there by? [16] A. By me.

Q. What, if anything, did you say to Mr. Bowman? A. I told him to go over to Vermont Avenue, and I would go and pick up material and be back to the job.

Q. Did you tell him where you would meet him? A. To my knowledge, we only had the twelfth floor left.

Q. So did you tell him where you would meet him on that job them? A. To my knowledge, I believe I did.

Q. And where did you tell him to meet you? A. On the twelfth floor.

Q. Twelfth floor.

At the building at 1025 Vermont Avenue? A. That's correct.

Q. And where did you go after that? A. Back to the shop to pick up material.

Q. And where was the shop? A. At that time the number was 510 Lincoln Avenue, Alexandria, Virginia.

Q. In Alexandria.

So you had to cross the river back into Virginia? A. That's correct.

Q. And, to your knowledge, where did Mr. Bowman go? A. He walked to Vermont Avenue.

[17] Vermont Avenue? A. Vermont.

Q. And did there come a time when you arrived in when you arrived back in Washington, D.C.? A. That's correct.

Q. And later that morning? A. That's correct.

Q. And where did you go? A. To Vermont Avenue.

Q. And what, if anything, did you find had occurred? A. There had been an accident.

Q. And who was involved in the accident? A. Bowman.

Q. What time did you get back? A. That I cannot remember exactly.

Q. Was Mr. Bowman—what was the condition of Mr. Bowman when you got back? A. He was removed from the job.

* * *

[18] Q. When you went back to Vermont Avenue, did you find any tools or equipment or anything? A. I did.

Q. Did you identify them? A. Yes.

Q. Who did they belong to? A. They actually belonged to the company.

Q. To whom? Were they actually in the custody of any employee? A. They were in the superintendent's office.

Q. When you got back? A. That's correct.

Q. Who had used those tools in the past? A. Bowman.

* * *

[19] Q. Now, had you worked with Mr. Bowman before on floors that were high in the air? High in height? A. I believe so, yes.

Q. Can you tell the ladies and gentlemen of the jury whether or not Mr. Bowman—anything about his condition involving height? A. [No response.]

Q. How he responded? A. He responded like anybody in that trade would do.

Q. How was that? A. That's the job you are doing.

Q. Does the job of window caulker, to your knowledge, involved any danger? A. Not to me, no.

Q. Not to you.

Does it involved being at high areas? A. Yes.

* * *

[20] Q. Mr. Tonstad, did you, when you arrived back at 1025 Vermont Avenue, did you actually go to the twelfth floor? A. No.

Q. You didn't go up there? A. No.

Q. Since March, 1964, had you changed positions in any way in connection with the Vinge Company. A. Yes.

Q. All right.

What is your present relationship with Vinge Company, if any? A. No relationship.

Q. What did transpire after March of 1964 in connection with the change of ownership of that company? A. Mr. Vinge retired. I started my own company.

* * *

[21] Q. Mr. Tonstad, the question was, had Mr. Bowman continued to live, had he not died on March 9, 1964, would a position have been available with your company for Mr. Bowman as a window caulker? A. The construction is not such that you would employ anybody for five or six years. It is from hour to hour, day to day, and week to week.

Q. If work was available, would you have continued to employ him? A. Yes.

Q. And approximately how long does it take for an apprentice caulker to become a mechanic caulker? A. The union rules are three years.

Q. According to your knowledge and to what you had. [22] your knowledge of Mr. Vinge's business, and what you took over, would at this time Mr. Bowman have advanced to mechanic caulker? A. Yes.

* * *

CROSS-EXAMINATION

BY MR. GREENEBAUM:

Q. Mr. Tonstad, I believe you stated that you met Mr. Bowman about 7:30 that morning. Is that correct? A. Yes, approximately.

Q. And approximately what time was it that you sent him out to the Vermont Avenue job? A. I would say about—it would be 8:00 or 8:30.

Q. And at that time you told him to wait for you on the job. Is that right? A. That's correct.

Q. Now, I think I may have misunderstood you, but I'd like to clarify where you were when you first learned that Mr. Bowman had fallen to his death. A. In Mr. Vinge's shop.

Q. You had not gotten back to 1025 Vermont Avenue? A. That's correct.

Q. As a matter of fact, when you got to Mr. Vinge's [23] warehouse, the word was already there that Mr. Bowman had already died. Isn't that correct? A. Either that or right after there was a telephone call.

Q. Without going back at this point, when you testified at your deposition earlier in this case, you testified that the word was already there, that Mr. Bowman had died, by way of telephone call, when you got back.

Does that refresh your recollection, or would you like for me to find it for you?

MR. BENNETT: Your Honor—I object to that, Your Honor.

MR. GREENEBAUM: I'll find it.

THE WITNESS: Well, what's in the deposition . . .

MR. GREENBAUM: If Your Honor will indulge me one moment.

THE COURT: Yes.

MR. GREENBAUM: On Page 12, Your Honor, of the deposition, taken on Monday, March 17, 1969.

BY MR. GREENBAUM:

Q. You were asked this question: "Did you go from there out to the 1025 Vermont Avenue job?" A. "When I was out in the shop, there was a telephone call that Bowmand had fell from the building." A. I didn't state that just now before?

[24] Q. I thought you said, just a moment ago, you werent sure whether or not the call had been received before you got to the shop or after? A. Yes, you are correct.

Q. So, Mr. Bowman had already fallen to his death by the time you got from Seventeenth and I to the warehouse. Is that right? A. I can't quite remember if it was before or after I got to the warehouse.

Q. How long did it take you to go from Seventeenth and I to the warehouse? A. Approximately, from a half an hour to three-quarters of an hour.

Q. And, now, what was the material that you had gone back to get. A. Caulking material and also ochre.

Q. What is ochre used for? A. At that time it was used for a backstop.

Q. And what do you mean by "backstop"? A. You have a cavity around the window and you have to fill it up with a backstop in order to caulk.

Q. In other words, you have to apply the ochre before you can apply the caulking compound? A. That's correct.

Q. And at the time you sent Mr. Bowman to the job, [25] there was no ochre available on the job? Is that correct? A. To my knowledge, no.

Q. So he could not have worked until you got back? Is that correct? A. That is correct.

Q. Now, Mr. Bowman had worked on this job before. Had he not? A. Yes, sir. I believe so, yes.

Q. I believe you testified in response to Mr. Bennett's questions that Mr. Bowman may have worked on that job alone. Is that correct?

MR. LAMBERT: I object, Your Honor. I believe that the way the testimony was. He worked on a job before on the job, not specifically 1025 Vermont Avenue.

MR. GREENEBAUM: I was not clear about that. Then I would like to . . .

THE COURT: What's your contention, Mr. Lambert?

MR. LAMBERT: It wasn't to this particular job.

THE COURT: Did you understand the question that way?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. GREENEBAUM:

Q. As a matter of fact, Mr. Bowman had never worked [26] on this particular job alone, had he? A. Not to my knowledge.

Q. How much of building had been caulked prior to the date that Mr. Bowman fell to his death? A. To my knowledge, from the first including the eleventh floor.

Q. And was there any pattern to the way you did that? Did you start at one end and on—and work up, for example? A. We started at the first and continued to the second.

Q. How long had the Vinge Company been working on this particular job prior to the time of Mr. Bowman's death? A. A month or three to four weeks.

Q. And approximately how long did it take to do each floor? A. From one/two days.

Q. And would it make any difference in your operation as to whether or not the windows actually had glass in them at the time when you applied the caulking compound? A. It would.

Q. In what way? A. It would make it easier to do without the glass.

Q. And were you ever on the twelfth floor prior to the time of this accident? [27] A. No, sir.

Q. Do you have any personal knowledge as to whether or not there was glass in the windows on the twelfth floor prior to the time of this accident? A. The glass was in.

THE COURT: I didn't hear you, sir.

THE WITNESS: The glass was in.

THE COURT: Was in?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

BY MR. GREENEBAUM:

Q. And what kind of windows were they that existed on the twelfth floor at the time of Mr. Bowman's death? A. To my recollection, it was a pivot window.

Q. And what do you mean by a pivot window? A. It either shrinks in the middle or comes straight down from the top.

Q. And what would you have to do to that window in order to apply the caulking compound after you apply the ochre? A. You would have—you have to open it even before you apply the ochre.

Q. And how would you open the windows in this particular building? What had been your experience? A. I believe you had to use keys.

[28] Q. And had you found in the past when you worked at this building that the windows had been kept locked? A. On all floors that we did notice, there was no glass in them.

Q. And on the twelfth floor there was glass in them and the windows were locked. Is that correct? A. To my knowledge, yes.

Q. And where would you get that key? A. Either the superintendent on the job or the man who installs the windows.

Q. And when would you get that key? A. That depends.

Q. Had you already gotten the key to do the work on the twelfth floor? A. Not to my knowledge, no.

Q. So you would have gotten that key when you went to the job after you got the ochre. Is that correct? A. Not necessarily.

Q. Do you know if anyone got that key? A. I do not.

Q. And after you got the key and after you opened the windows, where would you stand in order to put the ochre? A. On the floor.

Q. On the floor of the building on the inside of [29] the wall. Is that right? A. Correct.

Q. You just reach out and apply it to the outside of the edge? A. Correct.

Q. And you would work your way around the floor in that way? A. Correct.

Q. Now, how had you or your employees on occasions when you worked at this building before gotten your caulking gun and your caulking compound and your ochre and any other material that you might have required from the gound to the floor on which you were working? A. Carry it.

Q. By hand? A. That's correct.

Q. And did you ever on any occasion on behalf of the Vinge Company ask for permission or otherwise use the hoist on that job? A. No, sir.

Q. As a matter of fact, it was the policy of the Vinge Company not to use the hoist. Isn't that correct? A. That's correct.

Q. And that was clearly made known, so far as you know, to all your employees, particularly those people over [30] whom you had supervision. Was it not? A. That is correct.

Q. And you were Mr. Bowman's immediate supervisor, were you not? A. That's correct.

Q. And you were going to work with him that particular day? A. That's correct.

Q. And had that hoist been present on the job during the whole time that the Vinge Company worked on the job in the past? A. Yes.

Q. And so far as you know, had you ever instructed any employee to get on or near the platform on the hoist itself? A. No.

Q. As a matter of fact, there was no reason for them to be near it, was there? A. No.

Q. Where was it that you identified Mr. Bowman's tools after the occurrence? A. In the superintendent's office.

Q. And approximately what time was that, sir? A. Around 11:00 or that area.

Q. Did you have an occasion to examine the caulking [31] gun that Mr. Bowman had had with him on the job? A. I did not examine it, no.

Q. Did you look at it? A. Yes.

Q. And could you tell whether it had materials in it or whether or not it was clean? A. To my recollection, it was clean.

Q. That would indicate to you, as a man experienced in the trade, that he hadn't been using that gun that morning. Is that right? A. That is correct.

* * *

Q. Mr. Tonstad, the area of the building or the wall of the the building where the hoist went up in the back, do you know what I am talking about? A. Yes.

Q. Are there platforms leading out to that hoist? A. Yes, sir.

Q. And what would be done with that wall so far as when the construction ended? A. The hoist would be taken down from the stash [32] (phonetically) and it would be put in and we would caulk that particular part after the hoist was down.

[33] CROSS-EXAMINATION

BY MR. GIONFRIDDO:

Q. Mr. Tonstad, you testified that Mr. Bowman was an apprentice. A. That's correct.

Q. Now, this is a classification, as I understand it, which is established by the union. Isn't that right? A. Yes.

Q. And anybody who first comes into the trade comes in as an apprentice? A. Yes.

Q. And then the union requires that he remain an apprentice for three years. . . A. Yes.

Q. . . .before he can become a mechanic. Is that right? A. Yes.

Q. So if I came in to the trade as an apprentice, and at the end of a year or two years I was perfectly qualified to do the work, just like a mechanic, I would still have to remain an apprentice by union regulations. Is that right? A. That's correct.

[34] Q. So the term "apprentice" has no meaning as to the actual quality–qualifications of the man or the quality of his work, does it? A. No.

* * *

REDIRECT EXAMINATION

BY MR. BENNETT:

Q. Mr. Tonstad, you testified on cross-examination to Mr. Greenebaum, I believe, that you said to your knowledge the first through the eleventh floors had already been caulked prior to this date. A. Yes.

Q. And to your knowledge, did you know that? A. Yes.

Q. And is that why you were sending men to the twelfth floor? A. That's correct.

* * *

[35] CLYDE W. FARRAR, JR.
called as a witness by the plaintiff, after being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FURLOW:

[36] Q. Now, would you give us your name, please.

A. Clyde W: Farrar, Jr., F-A-R-R-A-R.

Q. And your home address, Mr. Farrar? A. Apartment 714, 1001 Third Street, Southwest, Washington, D. C.

Q. How old are you. A. Thirty-three.

Q. And what is your employment, Mr. Farrar? A. I am employed by the District of Columbia Government Minimum Wage and Industrial Safety Board.

Q. And what duties do you perform there? A. I have the title of Supervisor of Safety Specialty.

THE COURT: Supervisor of what, sir?

THE WITNESS: Supervisor of Safety Specialty, sir.

BY MR. FURLOW:

Q. And what do you do? A. My job under the title is to foster, promote, and develop the safety of the wage earners of the District of Columbia and relations to their working conditions.

Q. And would you describe the particular functions –the things that you do? A. We investigate accidents and complaints.

Q. What kind of accidents? [37] A. Industrial accidents.

Q. And when you say "industrial accidents," what field are you referring to? A. Construction, fixed establishments, transportation, reail and wholesale.

Q. Now, Mr. Farrar, what is your educational background? A. Completed the first year of college. I have been employed in the construction industry the majority of my adult life. My family was in it. I was employed by my father, in business with him in 1953; and I worked at (inaudible) Naval Air Station in '53, in construction of a naval air station there.

I worked in civil safety when I came to the Washington, D.C. area. I worked for Triangle Construction Company. I was employed by the Norian (phonetically) Engineering Corporation and the Norain (phonetically) Engineering Associates. I was employed as a safety engineer on the History and Technology Building of the Smithsonian downtown on Fourteenth and Constitution Avenue, Northwest.

I have, since '62–I have been employed by the D.C. Government. I am a present member of the Washington Building Congress, Building Code Committee. I am an associate member of the American Society of Safety Engineers since 1967.

[38] Q. Thank you, Mr. Farrar. How many accidents have you investigated since you have been with the District Government? A. Between 350 and 450.

Q. You–have you testified–have you testified before as a qualified expert in this field . . . A. Yes, sir.

Q. . . . Mr. Farrar? A. Yes, sir.
Q. What court? A. This Court.
Q. In this Court? A. Yes, sir.
MR. FURLOW: Your Honor, I tender Mr. Farrar as being a qualified expert in this field.
THE COURT: Any objection, gentlemen?
[Pause.]
THE COURT: Apparently not. You may proceed, sir.
BY MR. FURLOW:
Q. Mr. Farrar, turning your attention to March 9, 1964, did you receive some notice of an accident on that day? A. Yes, sir.
Q. What type of notice did you get? A. My office was notified by Mr. Tauber, [39] T-a-u-b-e-r, of the Fire Department, at 9:19 a.m., on March 9, 1964. An injury occurred at 9:07 a.m.
MR. GREENEBAUM: Objection, Your Honor.
I don't see how this man can testify that an injury occurred other than what he received in the notice.
THE COURT: Did you receive a notice?
THE WITNESS: Yes, sir, I have it here.
THE COURT: When did you receive it?
THE WITNESS: March 9, '64.
THE COURT: At what time?
THE WITNESS: 9:19 a.m.
THE COURT: What is your question, Mr. Furlow? Was that it.
MR. FURLOW: Yes, it was, Your Honor.
BY MR. FURLOW:
Q. Now, Mr. Farrar, what did you do in response to receiving that notice? A. It was typed and given to me and assigned to me to investigate at 9:25 a.m., and I responded at that time to the scene.
Q. Now, when you say you responded to the scene, you went somewhere then? A. Yes, to 1025 Vermont Avenue, Northwest.
Q. And what did you do when you arrived? A. I arrived on the scene and met with the police [40] officers of the

Homicide Division and was escorted to the twelfth floor along with them.

Q. You proceeded to the twelfth floor? A. Yes.

Q. What did you find when you arrived at the twelfth floor? A. I found there had been an accident.

* * *

[41] THE COURT: Ladies and gentlemen, I am going to state what I understand to be a stipulation between plaintiff and counsel for the Redding Company.

There was in force and effect at the time of this occurrence, a regulation labeled D-112105, and it reads as follows:

"Each entrance to a shaft shall be provided [42] with substantial gate, door, gate or hinge bar. If a hinge or bolted bar is used, it shall be at least eighteen [18] inches from the line of travel to the extreme edge of the car or cage, and thirty-six [36] inches above the platform level."

Mr. Farrar, who was here and sworn in this case, if he were here now, would testify that there was no door, no gate, or hinge bar or bolted bar. He was not in a position to testify as to the other features of the regulation; namely, the height or the distance from the car, the edge of the car.

He would also testify, if he were on the stand, by virtue of the stipulation, that there was a regulation in effect as follows under C of 1121106, Safe Practices:

"[1] An effective uniform signal system shall be used to signal operator and a conspicuous copy of said signal system shall be posted at each work level and at the operator's station."

He would testify that there was no such conspicuous copy of a signal system posted at the time of his arrival at the scene of the accident.

He would also testify that the bell here was audible throughout the cage of the lift.

There has been further received in evidence a photograph taken and Plaintiff's Exhibit Number Five [5], which shows the scene and reflects therein a bar which is [43] tilted up and which is fixed or jammed at the right side of the picture.

If the witness were here to testify before you, he would testify that it was neither hinged nor bolted, but that it was fixed or jammed.

* * *

THE COURT: In addition to what I said, counsel asked me to give you these facts: That the gentleman indicated he reached the scene about 10:15 a.m. We are talking only of the twelfth floor of the building, 1025 Vermont.

This gentleman would testify that the cage was at least eighteen [18] or more than eighteen [18] inches from the platform and that the bar reflected in the picture, showing it up, was a two-by-four.

* * *

[44] THE COURT: Ladies and gentlemen, the cage is supposed to be, under the regulation, at least eighteen [18] inches from the bar.

The witness would testify that the two-by-four, which he testified was there and shown in the picture, was more than eighteen [18] inches from the cage.

* * *

THE COURT: And Number Five is Received in [45] Evidence.

THE DEPUTY CLERK: Plaintiff's Exhibit Number Five Received in Evidence.

[Plaintiff's Exhibit Number 5, not identified in this transcript, Received in Evidence.]

MR. FURLOW: We call Mr. Humphrey.

ROBERT LEE HUMPHREY

called as a witness by the Plaintiff, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FURLOW:

Q. Now, can you give your name, please. A. Robert Lee Humphrey.

Q. And your address, Mr. Humphrey? A. 8416 Lancaster Road, Silver Spring, Maryland.

Q. And what is your age? A. My age is 65. I was born on the sixth day, sixth month, 1904, which I am just past 65.

Q. And what is your occupation? A. Operating engineer. And I am a member of the AFL-CIO Operating Engineers, District of Columbia. I also carry an operating engineer's license. I am licensed under the District of Columbia.

Q. Now, when you say "operating engineer," what do you operate? [46] A. We operate all of the heavy construction equipment, which you see all over this particular—well, Virginia, Maryland, you know, we cover all this territory.

Q. What is it in particular that you operate? A. Well, I can operate any of this equipment which you might observe on these construction jobs, such as . . .

Q. Are you a hoist operator, Mr. Humphrey? Do you operate a hoist? A. I am a hoist operator, a crane operator, and we operate all of these different attachments that you might assemble to these cranes. You know . . .

Q. Who are you working for at the present time? A. Sir?

Q. Who are you working for at the present time? A. I'm with the—I'm down with the John MacShane (phonetically) on the John F. Kennedy Performing Arts Center at the present time, and I'm on a hoist down there, too, at the present time.

Q. Were the—were you the hoist operator for Redding and Company in March 1964? A. Sir?

Q. Do you recall that time? A. Oh, yes, indeed.

[47] Q. And do you recall being a hoist operator at—in connection with the construction of a building at 1025 Vermont Avenue? A. Yes, that's the Redding Company's job, right?

Q. Yes. And do you recall an accident that occurred there on March 9, 1964? A. Yes, indeed.

Q. Would you describe the hoist that you were operating at that time. A. Well, at this particular time in the particular job, as it is set up, we had what you call a double

hoist. That's two towers, you know, two towers--it was a cage to each one. And so this Redding Company had sublet to Izzo Company to take care of their material. . .

MR. STEWART: I object.

THE WITNESS: . . . the brick work.

* * *

BY MR. FURLOW:

[48] Q. Where was the hoist located, Mr. Humphrey? A. Well, this particular morning . . .

THE COURT: No, sir. Where was the hoist located?

THE WITNESS: At the penthouse, top floor. That's as high as you could go. We was taking the material to the penthouse, which was up, you know, to the top of the building.

BY MR. FURLOW:

Q. Where was the cage located? A. Well, I started--now we have signals to go by, and whenever I got the three rings. . .

Q. Excuse me, Mr. Humphrey, I must be using the wrong terminology, but I want to know is where was the structural shaft or tower. Where was that located? A. Well, I took a load of mortar to the penthouse top floor--and then when I got the rings . . .

Q. Excuse me, Mr. Humphrey.

THE COURT: You wait and let him put the question [49] to you, sir. Let Mr. Furlow tell you what he is asking you, sir.

THE WITNESS: I'm sorry.

MR.FURLOW: I'm trying to find out, Mr. Humphrey. . .

THE COURT: That's all right

BY MR. FURLOW:

Q. . . . where your shed was, where your shed was located and where the structural shaft or tower was in which the hoist went up and down. Where was that located in relation to the building? A. Well, let me see now.

We'll take this as the building on the left here. [Demonstrating] And the hoist is a little bit taller than that

wall (pointing). And here I am back here in this engine as –in this engine room–and we have a very low ceiling, and I could only see the bottom of the second floor. That's as high as I could see up.

Now, the hoist . . .

Q. Was the hoist on the front or the back of the building or on the side? A. Well, the two cages is direct in front of the building or on the–like from here over towards that wall. And we was–the cage, at this particular time, was on the top floor–was at the penthouse–the roof, you might say.

[50] Q. Now, was your shed and the hoist machinery –what side of the building was it on–was that on? A. Well, that would be on the east side from Vermont. Vermont, I'd say would be on the west, and I'm set up here in the back of the building, which is, I usually–I would designate–it would be direct on the east side.

The two hoists in my building–in the operating engine room and everything–was on the east side.

Q. Now, how would you know when to raise or lower or stop the hoist, Mr. Humphrey? A. Well, we have signals –bells. We have a –like a sash cord, a sash cord. It goes all the way to the roof and I have two bells, a bell for each cage, which I have two cages. And so I signal three rings on the bells to come down, two to go up, and one to stop, and four means that you are heavy loaded and come down easy. Now, that's the standard rules that we went by, and that is the standard which–which is set through the Safety Board of the District of Columbia.

Q. That was the system of bells that you were using at that construction site at the time. Is that right? A. That's right.

Q. Now, Mr. Humphrey, the day of the accident, do you recall about when the accident occurred? A. Well, this was rather early in the morning. [51] Now, it–Izzo. . .

Q. About what time would be "early in the morning?" A. Well, we have to–whenever we–whenever we are working for a sub-contractor . . .

THE COURT: Excuse me. All he's asking you, sir, is when this accident happened if you know. What time of day?

THE WITNESS: Well, it was–I would say it was something like 7:30 in the morning, work time, for all crafts.

BY MR. FURLOW:

Q. Mr. Humphrey, what were you doing at the time the accident occurred? Can you tell us what work you were performing? A. I was carrying up at this particular moment mortar for the Izzo Company, you know, mortar for the brick work and cinder block work, which was on the penthouse.

Q. Now, how was the mortar loaded? A. It was loaded by wheelbarrows. Mr. Williams was the man on the ground and mixed up the mortar. He would dump it out of the mixer into the wheelbarrow; and then he would put, I think, two at a time–two wheelbarrows at a time would go up on the cable.

Q. When he put the wheelbarrows themselves on or would he dump the load on? A. No, no, he would roll the wheelbarrows on there, too, and then he would give me– he was just like– [52] well, he was on the ground, he could see me; and when he would load it, he would tell me to take it up.

Q. Would he give on–would he give you a signal? A. Yes, he was–he was visible, just like you and I, and he would load it and tell me to take it up.

Q. He would raise his hands? Is that what he would do? A. Yes.

Q. He would give you the signal, and then what would you do? A. Then I knew–I knew where to take it to. I knew the designation, you know, would be–I know where I was going, where I was taking it to. And at that time I knew where to take it to, which was at the top, the penthouse, which was, you know, where the work was being performed.

Q. Do you know how many floors were in that building, Mr. Humphrey? A. What?

Q. Do you recall how many floors that building had? A. I think-I think it was a ten-story building, and the top was the penthouse.

Q. Now, the penthouse would be the top story? A. Yes.

Q. On the roof part? A. That's the roof, yes.[53]

Q. And who was working up there, if you know? A. The—I don't know—the—it was the bricklayers. I con't know—I don't know—I can't recall the name. I didn't know any—any—anyone's name in particular.

Q. Now, this Mr. Williams that you mentioned—who was he employed by? A. He was employed by Izzo Company, and he was the mortar mixer on the ground.

Q. Now, Mr. Humphrey, will you describe what you recall about the accident when the accident occurred and what happened. A. Well, I got the signal to—whenever they unload the cage and they might put an empty wheelbarrow on—take the loaded one off, and put the empty one on—then they give me three rings and that means to come down.

And when I started to move the cage, Mr. Williams, that was the mortar mixer on the ground, he observed this man up there under the cage. The floor was under the cage, which I designate would be the tenth floor.

* * *

MR. STEWART: Your Honor, I object. He is trying to tell us what Mr. Williams observed.

THE COURT: (To witness) You can't do that, sir. You just tell what you did. You can't tell what the other person saw. Please don't, sir.

[54] We have certain rules. That's all we're trying to do. We're not being rude to you, sir. We are just trying to comply with the rules.

As I understand it, you told Mr. Furlow that you got three rings and you started to move. Then what's the next thing, if anything, you did?

THE WITNESS: Well, Mr. Williams said, "Hold it!"

THE COURT: "Hold it!" All right, sir.

THE WITNESS: Mr. Williams—he was on the ground, and he says, "Hold it!"

THE COURT: All right, sir.

THE WITNESS: And he said, "Raise the cage up a little bit," which I raised it about two feet, and then he got. . .

BY MR. FURLOW:

Q. Did he tell you why? A. Well, he thought.

THE COURT: You can't tell what he thought.

THE WITNESS: Mr. Williams told me to raise the cage up a little bit and I guess. . .

* * *

[55] Q. What did he say? A. He said, 'Raise it up a little bit," and I raised it up about two feet.

Q. Did he say anything more? A. No, no, he thought...

* * *

Q. After you raised the hoist, then what happened? A. Well, I "dogged it off." I didn't move the hoist. "Dogging it off" is something that. . .

Q. What does it mean? [56] A. Well, you put a--what you mean by "dogging it off," you put a latch in a gear that won't let it go no where. That's a safety-first latch. And I put it--I "dogged it off" and I set there.

Q. About how high up did you--did you move the cage? A. I moved it about two feet.

Q. About two feet? A. And "dogged it off." I kept right in my seat and didn't mean--I didn't move, and in a few seconds the man hit the ground.

* * *

Q. Where did the man hit? A. The man hit--the man hit the ground right where the cage comes down to.

Q. Right below where the cage would be? A. Like you set the cage right here on the floor, that's where he hit--right where the cage sets down, that's where he hit.

Q. What did you do after that? A. I didn't do a thing in the world but set right in my seat until everything--all the investigation was made, [57] safety man was there, and the man was took away in the ambulance and everything.

I never moved. I was just like--petrified. And I kept my position and I stayed right there until I--in other words, I was . . .

THE COURT: I believe you have answered the question. Go ahead, Mr. Furlow.

THE WITNESS: I was. . .

THE COURT: No, sir, let Mr. Furlow put another question to you.

THE WITNESS: Yes, sir.

BY MR. FURLOW:

Q. Mr. Humphrey, you didn't--as I understand it, you just saw the body when it struck. Is that right? You didn't see it before? A. No, sir, I could only. . .

THE COURT: Please, sir, don't speculate. You didn't see it until it was on the ground?

THE WITNESS: That's right.

* * *

BY MR. FURLOW:

Q. Do you recall Mr. Williams saying anything to you li,e, "Hold it." You've got a man up there!"?

MR. GREENEBAUM: I object to that as leading him.

[58] THE COURT: Yes, you are leading him, sir. I think he did say, "Hold it!"

THE COURT: (To witness) You did say he said "Hold it!" didn't you, sir?

THE WITNESS: When I--when I saw . . .

THE COURT: No, sir. Just what you said he said

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: Yes, when Mr. Williams said, "Hold it!"

* * *

Q. Mr. Humphrey, about how long was it between the time you held it and stopped and the time you reserved it? Was there any appreciable period of time there? A. Well, it only take about two or three seconds to move it up two feet and "dog it off." and then it was only [59] a few seconds after that that the man hit the ground.

THE COURT: All right, sir.

THE WITNESS: And he said, "Raise the cage up a little bit," which I raised it about two feet, and then he got. . .

BY MR. FURLOW:

Q. Did he tell you why? A. Well, he thought.

THE COURT: You can't tell what he thought.

THE WITNESS: Mr. Williams told me to raise the cage up a little bit and I guess. . .

* * *

[55] Q. What did he say? A. He said, 'Raise it up a little bit," and I raised it up about two feet.

Q. Did he say anything more? A. No, no, he thought...

* * *

Q. After you raised the hoist, then what happened? A. Well, I "dogged it off." I didn't move the hoist. "Dogging it off" is something that. . .

Q. What does it mean? [56] A. Well, you put a–what you mean by "dogging it off," you put a latch in a gear that won't let it go no where. That's a safety-first latch. And I put it–I "dogged it off" and I set there.

Q. About how high up did you–did you move the cage? A. I moved it about two feet.

Q. About two feet? A. And "dogged it off." I kept right in my seat and didn't mean–I didn't move, and in a few seconds the man hit the ground.

* * *

Q. Where did the man hit? A. The man hit–the man hit the ground right where the cage comes down to.

Q. Right below where the cage would be? A. Like you set the cage right here on the floor, that's where he hit–right where the cage sets down, that's where he hit.

Q. What did you do after that? A. I didn't do a thing in the world but set right in my seat until everything–all the investigation was made, [57] safety man was there, and the man was took away in the ambulance and everything.

I never moved. I was just like–petrified. And I kept my position and I stayed right there until I–in other words, I was . . .

THE COURT: I believe you have answered the question. Go ahead, Mr. Furlow.

THE WITNESS: I was. . .

THE COURT: No, sir, let Mr. Furlow put another question to you.

THE WITNESS: Yes, sir.

BY MR. FURLOW:

Q. Mr. Humphrey, you didn't–as I understand it, you just saw the body when it struck. Is that right? You didn't see it before? A. No, sir, I could only. . .

THE COURT: Please, sir, don't speculate. You didn't see it until it was on the ground?

THE WITNESS: That's right.

* * *

BY MR. FURLOW:

Q. Do you recall Mr. Williams saying anything to you li,e, "Hold it." You've got a man up there!"?

MR. GREENEBAUM: I object to that as leading him.

[58] THE COURT: Yes, you are leading him, sir.

I think he did say, "Hold it!"

THE COURT: (To witness) You did say he said "Hold it!" didn't you, sir?

THE WITNESS: When I–when I saw . . .

THE COURT: No, sir. Just what you said he said

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: Yes, when Mr. Williams said, "Hold it!"

* * *

Q. Mr. Humphrey, about how long was it between the time you held it and stopped and the time you reserved it? Was there any appreciable period of time there? A. Well, it only take about two or three seconds to move it up two feet and "dog it off." and then it was only [59] a few seconds after that that the man hit the ground.

Q. Did you–did you put it in reverse and raise the hoist immediately after or did you hold it for a period of time? A. No, when Mr. Williams said, "Raise it up a little bit." I immediately raised it up–I say a couple of feet and "dogged it off."

Q. And, about how long was it between the time that Mr. Williams said "Hold it!" and then said, "Raise it up a little bit."? Was there a period of time there? A. Oh, well, you could only–you could only say two or three seconds that I moved it up because I–he was–he was as close as from me to you and when he said, "Hold it!" "Raise it up." I immediately raised it up about two feet and "dogged it off."

Q. And did he say, "Hold it!" and "Raise it up," in one sentence? Like that? A. Yes. He said "Hold it!" and then he said "Raise it up." I raised it up about two feet and "dogged it off." and it remained there until everything was squared away.

Q. About two or three seconds after you raised it, the body struck the ground? A. Yeah. Uh-huh.

Q. Mr. Humphrey, you testified that you were employed by Redding and Company at that time? [60] A. Yes, sir.

Q. And you were paid by them? A. I was paid by Redding, yes, sir.

MR. FURLOW: I have nothing further, Your Honor.

THE COURT: Mr. Greenebaum.

CROSS-EXAMINATION

BY MR. GREENBAUM:

Q. Mr. Humphrey, how long have you been operating a material houst? A. Well, I've been operating them over–ever since 1927.

Q. I believe that your designation is that of an operating engineer. Is that correct, sir: A. Yes, sir.

Q. And as an operating engineer, do you operate all kinds of heavy equipment? A. All kinds of heavy equipment.

Q. And . . . A. And I've worked for practically every contractor in Washington, D.C. And at the present time

I'm with John Machaine (phonetically) down at the Performing Arts–the John F. Kennedy Performing arts.

Q. Do you work as a hoist operator there? A. Right now, yes, sir.

Q. So that you have regularly worked as a hoist [61] operator through the years? A. Well, we don't own the operating hoist. We operate cranes and you have seen these big twirly birds on top of a building? We cover everything. All the heavy equipment.

Q. This shed, I believe, was in an alley, was it not? A. Yes, it was. Yes, it was in the back of–back of this building, where–which was in the alley.

Q. And this building itself was bordered itself by two alleys and a public sidewalk. Is that correct? A. Well, yes, there's an alley that comes in off of Vermont and then there's an alley that comes off of L in there, too.

Q. And the building is on the other side of those alleys? A. The building os off of–well, there is a drug store on the corner and this is between the drug store and the alley which runs off Vermont.

Q. And the shed was back as far as it could be from the actual construction? A. Yes, it was on the back side, yes, sir.

Q. And did this hoist–did you ever operate this particular kind of hoist before? A. Oh, yes, indeed.

Q. Is this what is known among operating engineers [62] as yourself as the American Tubular Standard Hoist? A. Yeah, uh-huh.

I think this particular hoist power was a tabular.

Q. And is that, based on your experience, customary and usual for the construction of a hoist? A. Oh, yes, uh-huh.

Q. And was this shed also conformed to what, in your experience, was a customary and usual . . . A. Oh, yes.

Q. . . . in building? A. Yes, indeed.

It met all safety standards.

Q. And based on–my understanding, am I correct, is that you have to have a hard cover on that shed so that

things coming from the building won't fall on it? A. The Safety Board—the safety rules require two inches . . . two inches thick over your head.

MR. FURLOW: I object, Your Honor.

THE COURT: What was had? Did you have a two-inch board over your head?

THE WITNESS: I had that and plus, Your Honor.

THE COURT: All right.

You have answered the question.

THE WITNESS: I had that and plus. I guess you [63] would call it something like five inches on that particular job because I do give the contractor credit for using full force. Full force, that's right jammed up together. So I had more than what the requirements say.

BY MR. GREENBAUM:

Q. And was the bell system which was used to indicate to you whether to raise or lower the—or stop the hoist? Did that also conform to custom and practice in the industry based on your experience? A. Yes, indeed. That met the standards.

Q. How would you characterize the bell? Would you call it loud or soft or . . . A. Well, we had—well, on this job, I did have a real good sized bell which was something like nine inches in diameter; and usually we work with a much smaller bell and still get the signals.

Q. So that bell would be heard pretty much all over the job when it was rung? A. Well, you would be surprised. You could hear it quite a distance. I would say from—clean out to L Street, from where it was in my shed. And, then, another thing, the bell is mounted inside where the operator can hear it very plainly. We demand the bells to be installed, you know, close—very close by us so we can get the proper signal.

[64] Q. At the time when Mr. Williams said "Hold it!" I was unclear as to what you said as to whether or not the cage was in operation or not at that particualr moment. A. I beg your pardon.

Q. I want to clarify, if I can, at least, for my own information, whether the cage was in motion or stationary at the time that Mr. Williams told you to "Hold it!" A. Well, when I got the signal three to come down, right at the moment Mr. Williams said "Hold it!" and I–I don't think I moved–dropped the cage more than a foot when he said "Hold it!" And then he said "Raise it up" and then I went up to about two feet, "dogged it off."

Q. And the cage, prior to the time you had started it down and just barely gotten it going a foot or so, it had been up on the roof. Is that right, sir. A. That's right.

* * *

[65] Q. I just wanted to know if you would know day by day for whom you would be hauling. A. Well, now I'd be hauling for a general contractor more or less.

But he, if I'm not–if I'm not overshooting the thing–he, the general contractor, as a rule, takes care of a lot of their sub-contractors' work, you know, like Izzo–done the brick work. cinderblock.

[66] THE COURT: Do you have anthing further, Mr. Furlow?

MR. FURLOW: Yes, sir.

REDIRECT EXAMINATION

BY MR. FURLOW:

Q. Mr. Humphrey, I think you said that you brought the hoist down about a foot or so. Is that what you said before you got that signal from Mr. . . . A. Mr. Williams.

Q. . . . Mr. Williams? A. Yes, I just started. I just started and I presumed–I only moved it, dropped it about –about a foot when he told me to "Hold it!" And then, when he said to "Raise it up," I raised it up about two feet.

Q. Where had the hoist been? A. Sir?

Q. Where had the hoist been? A. To the roof.

Q. To the roof? A. That's right.

Q. Now, if it had only gotten about a foot . . .

THE COURT: Now, don't argue with him, please, sir. You'll have a change to do that later.

MR. FURLOW: All right. All right.

BY MR. FURLOW:

[67] Q. Could you have dropped it as much as . . .

THE COURT: I sustain the objection.

BY MR. FURLOW:

Q. If it came down about a foot, and you raised it back up about two feet, where would that have put it, Mr. Humphrey? A. Well, we—up to the cathead. Actually, it went four or five feet if I, you know . . .

Q. Above the penthouse level? A. Yes, you see, the cathead was way above the roof of the building. We have—that's the way we set up these hoists.

Q. That was a double hoist? A. Yes, we had on this particular job—there was two cages, two double cages. We was only using one cage at this particular morning because that was all that was necessary to take care of this sub-contractor's material, don't you see.

Q. Yes.

Now, do you have a way of designating the cage that was in use? A. That cage that was being used was next to me.

Q. The one closer to your shed was used. Is that right? A. Yes, that's right. That's the . . .

[68] Q. Do you call that by any number or name-that hoist? A. Well, no, it was the only thing is I could designate it could be the one towards my shed. And the one, the farthest one on the other side, wasn't in use. He wanted—we wasn't using that one.

* * *

[1004] WILLIAM MARGINOT

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[1005] BY MR. FURLOW:

Q. Would you state your full name and address? A. William Marginot, 8 Russell Road, Cabin John, Maryland.

Q. What is your age and occupation, Mr. Marginot? A. 38, sheet metal worker.

Q. Mr. Marginot, turning your attention to March 9, 1964, where were you employed at that time: A. Vermont Street. I think it is 1024 or 1025 Vermont Street.

Q. Who were you working for then? A. Hamilton and Spiegel.

Q. And what were you doing at that time at that location? A. Installing air ducts or hot air and cooling systems.

Q. Do you recall where you were working on that building. A. I was working on the tenth floor by the elevator shaft.

Q. Would you describe – are you sure about the tenth floor?

MR. GREENBAUM: I object to that.

THE WITNESS: Tenth or eleventh.

BY MR. FURLOW:

[1006] Q. How many floors did that building have, do you recall: A. Twelve.

Q. Does that refresh your recollection anyway as to what floor you were working on? A. It had to be the eleventh floor.

Q. Why do you say that? A. There was only one floor above me beside the roof.

Q. You said you were near the elevator shaft? A. I scaffolded the ramp going to the elevator shaft outside the elevator cage. You have a ramp going up to that that you have to scaffold it. You have to build up and over it.

Q. Were you working on the inside of the building or the outside? A. The inside of the building.

Q. Where were you in relation to the ramp or the platform leading to the outside hoist? A. I scaffolded the ramp right there.

Q. Your scaffold was over the ramp? A. That is right.

Q. So was part of your scaffold on the outside of the building? A. All of it was inside the building.

Q. Did the ramp extend inside the building? [1007] A. That is right.

Q. Your scaffold was over that ramp? A. That is right.

Q. Where were you on the scaffold? A. Right in the middle of it.

Q. About how far away were you from the opening in the building that led out to the hoist? A. The scaffold was built approximately a foot away from the inside wall and I was approximately about six feet away from the wall.

Q. How far up off the ground were you? A. Six feet.

Q. Was anybody else working with you? A. A man by the name of Hypo. I have never seen him since I stopped working with him at that particular time.

Q. About how long had you been on that job, on that part of the job on March 9?

THE COURT: If you recall.

THE WITNESS: It must have been around Christmas time.

BY MR. FURLOW:

Q. That you started? A. Yes.

[1008] * * *

Q. Did you observe any accident occur? A. Yes, I did.

Q. Would you describe what you observed? A. I seen a man fall right by less than six feet away at that time.

Q. Can you describe the position the man was in as he fell by you? A. I was laying down like. He was doing a cartwheel going by the elevator hoist outside the elevator shaft that the bricklayers use.

Q. Did you see him before he was in a falling situation?

* * *

[1009] A. Yes, I talked to him that morning.

Q. Would you state what you observed him doing when you saw him previously that morning? A. Like I say, the scaffold was built over the ramp.

Q. Your scaffold? A. Right, and he had to get up around me because it was so close, a foot away from the wall. The whole area was blocked off. He had to get up there and look and see if the windows were caulked. I imagine that was his job.

THE COURT: Just tell what he did.

THE WITNESS: He looked out the building to see if there was caulk out there.

BY MR. FURLOW:

Q. What did he look out through, Mr. Marginot? A. There was an opening right there beside the building between the scaffold. The cage is built there. Then you have a foot or so on each side of the cage. There is a foot or so on each side of the cage.

Q. Was this opening – A. The whole side of the building is open there. They leave that until last.

[1010] Q. He was looking out of that opening on that occasion, is that correct? A. That is right.

Q. What did he do after that? A. Probably said hello and just went off on his business.

MR. GREENBAUM: I object.

THE COURT: He left, sir?
THE WITNESS: Yes.
BY MR. FURLOW:
Q. Did you see in which direction he went? A. No.
THE COURT: Mr. Witness, we are not being rude to you. We are just trying to stay within the rules.
BY MR. FURLOW:
Q. Mr. Marginot, after you saw him falling, what did you do? A. Jumped off the scaffold, looked out the building and went downstairs.
Q. How far down the stairs did you go? A. It had to be twelve floors.
Q. All the way to the bottom? A. All the way to the outside elevator shaft.
Q. What did you observe? A. He was lying right there, right in the elevator [1011] shaft cage.
Q. Who else was there? A. There were a bunch of people just formed down there. That is all. The boss came down in a couple of minutes and said, "Lets get back to work."
Q. How long did you stay there? A. Probably ten or twelve minutes.
Q. Was he moved during the time that you were there? A. No.
Q. Did he move while you were there? A. No.
Q. Did he himself move? A. No.
Q. What did you do after you left. A. Went back up and went to work.
Q. And that was on the 11th floor where you were working? A. That is right.
Q. And then what happened after that? A. The homicide people came up and talked to me and from there we went to the 12th floor.
Q. And you were in the company of the homicide officers? A. That is right.
Q. How many officers were there? [1012] A. Two.
Q. When you arrived on the 12th floor, was anybody else there? A. Not to my recollection.

Q. When you got to the 12th floor, what did you observe? A. I went over to the elevator cage. There was a piece of canvass dropped there from the ceiling on down. That was all.

Q. Did you notice any safety bar across the entrance there?

MR. GREENBAUM: I object.

THE WITNESS: There was none.

MR. GREENBAUM: I object to the word "safety".

THE COURT: Did you see any bar there?

THE WITNESS: There was none.

BY MR. FURLOW:

Q. What did you do after that? A. Gave a statement to homicide about what I had seen and that was it.

Q. Did you go back to work? A. Yes.

Q. Did you have occasion to observe the 12th floor, whether anyone was there posting a signal system for the hoist? [1013] A. None whatsoever.

Q. Did you observe any? A. No.

MR. GREENBAUM: I object to that question. It is leading.

THE COURT: Do not lead him. I will let it stand.

BY MR. FURLOW:

Q. Mr. Marginot, do you know what the system of signals was for the hoist on that job? A. To operate the cage?

Q. Yes, to operate the cage? A. Yes.

Q. How were those signals transmitted? A. You have a rope on the outside of the buidling there attached to the cage. You unload your material off that cage and give it three sharp pulls and it rings a bell downstairs and the elevatorman sends it right back down. He operates it from the ground.

Q. Had you had occasion to use the hoist for raising and lowering material? A. Yes.

Q. When you pulled the cord, the cord as I understand it is at the end of the platform –it is right outside the cage? [1014] A. It would be either right in front of the cage or on the right or left hand side.

Q. It is not in the building? A. No.

Q. Could you hear the bell when you pull the cord? A. I cannot remember.

Q. Did you hear any bell on this occasion when you were working on the 11th floor? A. No.

Q. Did you notice whether or not the hoist was in operation when you were working on the 11th floor? A. Before or after this?

Q. Before this or about the time that you saw this body fall. A. Before that morning the hoist was operating, but not afterwards.

Q. How could you tell it was operating? A. I could see it. I was working right there. You could look out there and see the cable. If the cable is there, the elevator car is down.

Q. If you saw the cable, you mean that the cage is down below you level? A. That is right.

Q. What does the cable do? [1015] A. It controls it. It brings it up and down. It is operated by a cable.

Q. There is a double cable. Does it go up over? A. Right, over a pulley the top of the shaft.

Q. Mr. Marginot, when you saw the body fall, did you know where the cage was, could you tell where the cage was? A. It had to be above me.

Q. Why do you say that? A. Because I looked out there.

Q. What did you see? A. No cable.

Q. So that would indicate to you that the cage was above your level? A. It had to be above my level.

Q. Did you in fact look out at all to see where the cage was? A. I looked out there after the man fell.

Q. What did you see? A. The man was down on the ground.

Q. Did you look up? A. I cannot remember.

MR. FURLOW: I have nothing further, Your Honor.

CROSS EXAMINATION

BY MR. GREENBAUM:

Q. Did you know Mr. Bowman, Mr. Maginot? [1016]

A. Not personally. I spoke to him occasionally.

Q. Is it not true that if I gave you a picture of Mr. Bowman you could not identify him? A. I could not identify that man if you gave me a picture of him.

Q. You do not know what he looked like, is that right? A. Years ago I could, but not right now.

Q. What time was it when you got back up after you had been down on the ground? A. Like I say, it has to be before 9 o'clock because our coffee comes and it was before the coffee.

Q. When you say it has to be before 9 o'clock— A. We have our coffee before 9 o'clock or at 9, very seldom later.

Q. And the accident had already happened at that time? A. That is right.

Q. How much time elapsed for you to go downstairs and to come back up? A. That time I could not give you but I can estimate the time.

Q. How much time was that? A. About twenty minutes. [1017] Q. How long did you work after that before the Homicide people arrived? A. I have no idea.

Q. You did testify that you worked some period of time before they arrived, is that not correct? A. There was some period of time I was working before they came up.

Q. Now you yourself do not know where Mr. Bowman came from, do you, sir? A. I cannot pinpoint it, no.

Q. I believe you said that when you looked out from the building into the hoist shaft – A. Yes.

Q. You can tell when that hoist is above you because there is no cable in front of you? A. On that particular one I am right. But I have seen other cables.

Q. No, I am talking about that hoist shaft. When you looked out and saw no cable, you knew that cage was above somewhere, is that right? A. Yes.

Q. If you looked out and you could see cable there in the middle of the shaft, you knew that the cage was down

below you somewhere, is that right? A. That is right.
[1018] Q. And I believe you said that you were only one or two floors below the roof, is that right? A. Yes.

Q. So that even from where you were, if you saw no cable, you know that cage was pretty close up above you somewhere, did you not? A. That is right.

Q. Now you had never been on the 12th floor before this accident occurred, is that correct? A. Certainly I have been on the 12th floor.

Q. When had you last been on the 12th floor? A. Too long a time has elapsed.

Q. When you went up onto the 12th floor some time after this accident it is my understanding from your testimony that there was nothing there except this tarp, is that right? A. I call it a tarpoulin.

Q. Assuming I will agree with you on that that this tarpoulin was there, that is the only thing that was at the opening to this building, is that right? A. Now you are talking about a ramp and so. There was no bar across there.

Q. No bar whasoever I believe you said anywhere in that opening? A. There was no bar whatsoever.
[1019] Q. Can you tell us how the tarpoulin was draped? A. It was fastened from above the opening of this building right there.

Q. In what way? A. I don't know if it was nailed up or anything. I know it was there.

Q. Were there not two by fours there across the opening? A. No.

Q. Sir, do you remember, you have no recollection of how it was draped except it was as you told us? A. It could be nailed. I do not know. I was not the carpenter who installed it.

Q. Do you remember when you deposition was taken on October 18, 1966? A. I remember. I came down.

Q. You remember you were asked, "Q Can you tell us how it was draped, how was it attached?"

This is page 78.

"THE WITNESS: Probably with – all I know how to put it–two by fours. There were two by fours nailed above the holes. All these holes were nothing but windows when you finished with the cage. Put windows in there.

[1020] "Q. There was a two by four and the tarp was draped over the front? "A. Two by four over the hole, just let the tarpoulin hanging down over the hole."

Do you remember giving that answer to those questions? A. Sitting right here I cannot say.

Q. You do not deny you gave those answers to those questions? A. Sure, I cannot deny it.

Q. Is your recollection refreshed there was a two by four across that hole in some way? A. There was no two by four across that hole.

Q. Nowhere in the area? A. If I said it on deposition, that tarpoulin was up by a two by four and that is way above the shaft area.

Q. Was the tarpoulin covering the shaft? A. It was covering the opening of the side of the building.

Q. So what you would see would be the tarpoulin? A The tarpoulin and no two by four.

Q. I hand you a photograph which has been marked and introduced into evidence as Plaintiff Exhibit No. 5 and I ask you to look at that, sir? A. I see this.

[1021] Q. Are you able to identify what that picture shows? A. It looks familiar, but this is not the side. The Homicide people were right there. This is not the picture.

Q. In other words, you were saying when you got up on the scene with the police that this bar across this opening line out to the hoist was not there? A. I am saying when I and Homicide got up there, there was a tarpoulin draped across the hole. That tarpoulin is removed.

Q. Are you sure it was the Homicide people you went with sir? A. I believe at that time. He had a badge. He introduced himself from Homicide. He said he came from Homicide.

Q. Could it have been an inspector from the Industrial and Safety Board? A. I do not believe so.

below you somewhere, is that right? A. That is right.
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Q. Are you sure it was the Homicide people you went with sir? A. I believe at that time. He had a badge. He introduced himself from Homicide. He said he came from Homicide.

Q. Could it have been an inspector from the Industrial and Safety Board? A. I do not believe so.

Q. Was he there when you were there? A. I can't remember.

Q. Were any pictures taken while you were there? A. No.

Q. When you went up with the Homicide people, it is clear, it is not, that you were there with the homicide people about an hour after the accident? A. You asked me that question and I could not answer [1022] it.

THE COURT: Can you approximate the time, Mr. Witness?

THE WITNESS: No.

BY MR. GREENBAUM:

Q. At your deposition on page 78 you were asked, "Q. And that is when you were there with the Homicide people about an hour after the accident? A. Yes, because he was puffing and steaming getting up the steps."

Now this deposition was taken in 1966. This is 1969. Was your recollection better then than it is today? A. You do not see a man fall off a building every day. When I went upstairs, that is not what we saw.

Q. So that I am clear, you are saying this not a description of the accident site? A. What I am saying is that tarpoulin was draped across the hole and in that picture it is not draped.

Q. Were any pictures taken while you were there? A. I just said I do not believe so.

Q. You went right down the stairs, did you not, after the accident? A. All the way down.

Q. Did you pass anybody coming up? A. I do not recollect.

[1023] Q. Do you remember whether there was glass in the windows on the floor in which you were working? A. I cannot remember. Right this minute I cannot remember.

Q. Had you seen anyone caulking windows on the floor in which you were working prior to the time this accident occurred or any time? A. I cannot remember that far back.

Q. Did you ever see any window caulkers working on this job at any time when this accident occurred on any floor? A. Right now I cannot remember that either. I mean to give you an honest answer. I cannot remember.

Q. I appreciate it has been a long time.

MR. GREENBAUM: I have no further questions at this time.

* * *

CROSS EXAMINATION

BY MR. STEWART:

Q. Mr. Marginot, when you saw the body going down the shaft of the hoist, did you hear any noise, any sound, any scream? A. There was none whatsoever.

Q. Had you just prior to seeing the body as it went down the shaft, had you heard any noise of an impact of any kind or blow? [1024] A. None whatsoever, none whatsoever.

Q. I gather that you and Mr. Hypel, was that the man's name? A. I don't know his right name. I just call him Hypo.

Q. I gather the two of you had been working on this job since 7:30 on the morning of the accident? A. Definitely.

Q. You were aware that the cage was moving up and down that hoist, not paying any particular attention to it, doing your own work, is that correct? A. Yes.

Q. Now with regard to the man, Mr. Bowman, the deceased, had you on other days since you had been working on that job, had you noticed him specifically on this job? A. No.

Q. Now could your observation of this man as you told us about, that is, working his way behind your scaffold to look, could that have been the day before or the week before this accident? A. It had to be the same day.

Q. Are you able to pinpoint that? A. I am able to pinpoint it because we discussed it. It is not like a man walking around your cage and you forget about it. It is not an every day occurrence.

[1025] Q. Do you remember when you deposition was taken on the 18th of October, 1966, that you were asked about your observations with regard to the window caulkers? A. No, I do not.

Q. You do not recall that? A. Not right this minute.

Q. Do you recall that you were asked, commencing on page 76,

"Q. But you are not sure when you observed this?

"A. You want me to say 7, 8 or 9 o'clock in the morning, I do not know.

"Q. Well, did you observe it within a week of the accident?

"A. Oh sure, oh yes.

"Q. Did you observe him doing it that morning?

"A. That I cannot pinpoint."

Now do you remember those questions and those answers?

A. No

Q. Would you agree that in 1966 your recollections with regard to the details of this accident were clearer than they are now? A. My details of this accident are no more clear now than they were back then.

Q. Now you have no recollection one way or the other [1026] as to whether you did or did not hear the sounds of the hoist bell shortly before you saw this body, do you? A. No.

MR. STEWART: That is all I have. Thank you.

MR. ATTRIDGE: I have no questions.

CROSS EXAMINATION

BY MR. GIONFRIDDO:

Q. Mr. Marginot, as I understand it after you went down to the ground floor and then came back up and started to work there were two Homicide men that come up, was that it? A. I am saying one of them told me he was from Homicide. There was another man with him.

Q. So there were two men? A. Two men.

Q. They came to you on the 11th floor and then you accompanied them to the 12th floor, is that what you are saying? A. As far as I can remember.

Q. Can you give us an idea how long you remained and cooperated with them on the 12th floor before you went back down to the 11th and went back to work? A. Right now I cannot give you an honest answer on that.

Q. Do you have an idea as to whether you could have [1027] been there as much as half an hour or could it have been less? A. If I say something I do not know.

Q. I appreciate your honesty. When you left the Homicide people and went back to work, you went back to the 11th floor. A. As far as I can remember. There was no place else to go.

Q. That is where your scaffolding was and so forth? A. That is right.

Q. Do you remember how far that scaffolding was from the stairway that had to be used to go up and down the steps? A. It is quite a distance. It was not near the stairs. You come up the stairs and go right to the elevator shaft. shaft.

Q. Could you see the stairs from where you were working on that scaffold? A. Definitely.

Q. Do you recall whether you saw the Homicide man and his companion ever leave and go down the stairs after you returned to work? A. No, I do not remember that.

Q. Did they leave with you when you left or did they remain on the 12th floor? [1028] A. I believe they just—well—I don't know. I believe she took a statement and I left. Now I am not sure.

Q. When you left they would have been still up there? A. I would imagine.

Q. You don't ever recall them coming back down? A. Not right now, no.

Q. Do you remember how long you remained at that part of the building on the 11th floor, the rest of the day? Did you work there all day? A. I believe I did, yes.

Q. Do you ever recall seeing this Homicide man and his companion come back up after this? A. No.

Q. You don't recall that? A. No.

Q. To clear a point in my mind, Mr. Marginot, let us assume the opening of the building is right here. As I understand your scaffolding is right up against the front of the opening? A. Not right up against it.

Q. About a foot from it, but it is stretched across the opening? A. That is right.

Q. The ramp we are talking about goes from the opening out to this cage or this shaft? [1029] A. Yes.

Q. Where the two cages go up and down, is that right, the ramp runs from the building? A. It starts about eight feet back and builds up a little slope.

Q. And it goes out to the cage case, does it not? A. It either stops right at the finish of the building or the outside or maybe just a little bit over because cars will hit it if it does not stop right there.

Q. Now again assuming that this is the opening, you said that you saw Mr. Bowman work his way around your scaffolding to look out the building? A. As far as I can remember after seeing him fall we looked back at it when you are looking at the outside of the building from the inside. As far as I can remember he came around the right hand side of the scaffle. That would be logical, the outside of that building, that would be around the right hand side.

Q. What did he do? Did he walk out onto this ramp? A. No, he walked around the scaffold, not underneath the scaffold.

Q. He walked around your scaffolding and he had an area of about a foot between the scaffolding and wall and I presume he came through that to the opening. What did he do? [1030] A. No, he just poked his head out and looked around the building around the windows. That was not in the elevator cage. That was on the outside.

Q. When he did this he was not out in the elevator? A. No, he was not out there.

Q. Where the cage goes up and down? A. He was not out there. He was on the right hand side.

Q. Did I understnad you to say that you don't recall on this particular job whether you ever saw caulkers actually caulking windows or not? A. Right now I cannot remember that.

Q. You don't remember any window caulkers actually caulking windows on that job? A. If you asked me six years ago I could have answered that.

BY MR. GREENBAUM:

Q. When you testified Mr. Bowman just stuck his head out but he was not near that elevator shaft, how far out from the building is that elevator shaft? A. The space of the elevator car?

Q. No, in other words, the building wall ends and there is a platform going out toward the hoist. A. It starts from the inside.

Q. But starting from the building wall how much [1031] space is there from the outside of the building wall to the nearest side of the elevator shaft? A. The elevator shaft goes up probably about that much. I don't know.

Q. It is not an area of three feet at least from the wall? A. No, definitely not. No, sir, three feet to the beginning of the cage, the cage structure.

Q. About where in that structure does the cage run? A. From the ground all the way up.

Q. Is it inside that structure somewhere? A. I am losing you again. I am not following you.

Q. The cage runs inside the hoist structure, does it not? A. That is right.

Q. I believe you also said that you could not recall observing window caulkers, is that right, sir, working this building before this accident? A. I don't recall it right now.

MR. STEWART: I have nothing further, Your Honor.

MR. FURLOW: I have nothing further.

(Witness excused.)

MR. FURLOW: I call Leonard Williams.

LEONARD WILLIAMS

* * *

[1032] DIRECT EXAMINATION

BY MR. LAMBERT:

Q. Would you state your full name? A. Leonard Williams.

Q. What is your address? A. 1117 Morey Street, N.E.

Q. Waht is your age, sir? A. Going on 54.

Q. What is your occupation, Mr. Williams? A. Laborer.

Q. What is the nature of the work you do as a laborer? A. Construction work, road and brick, mortar.

Q. For whom do you work? A. Who do I work for?

Q. Yes. A. Mr. Izzo.

Q. Is that the Izzo Company, Incorporated, the defendant here? A. Yes.

Q. How long have you worked for this defendant corporation? A. Eight years.

[1033] Q. Did you work for anybody before that in this same capacity? A. I worked for Mabison.

Q. You were working then for Mr. Izzo on March 9, 1964, when a man was killed on the job, were you not? A. Yes, I was.

Q. Where was that job, Mr. Williams? A. I called it down at Fourteenth and Vermont Avenue there.

Q. Fourteenth and Vermont. You don't know the number of it? A. No, I don't know.

Q. You don't know the number of the premises? A. No, I don't.

Q. Was the building on Vermont? A. Right over Fourteenth and Vermont Avenue.

Q. Now on that particular day when the man was killed, about what time of day was he killed, do you remember? A. It has been so long, I just cannot remember what time it was.

Q. Can you tell whether it was in the morning or the afternoon? A. It was in the morning.

Q. What were you doing that morning? A. Well, I was sending stuff to the penthouse.

[1034] Q. What sort of stuff? A. Mortar and bricks and blocks.

Q. Now where were you working in respect to the building, in the front or the back of the building? A. In the back of it.

Q. Did you have any machinery to work with like a mixer? A. Yes, I had one sitting back there.

Q. Where was that mixer located? A. It was coming down through the alley, coming through there and it was sitting on this side of the alley.

Q. Did the alley run in the back of the building, the length of the building? A. Straight through.

Q. The length of the building in back? A. Yes.

Q. You were on the other side of the alley, at least your mixer was on that side? A. The mixer was on that side.

Q. On the other side. When you got the material mixed, what did you have to do with it? A. I ran up on the platform where we loaded at.

Q. Where was that platform in relation to the mixer? A. It was the platform on this side of the alley.

[1035] Q. The far other side of the alley, was it? A. The mixer on this side and the platform on this side.

Q. How far was it from your mixer to the platform where you sent it up to the bricklayers? A. You come all the way across from the alley right to the platform.

Q. Can you give any estimate at all as to the distance across there? A. Around about 16 feet.

Q. About 16 feet? A. Yes.

Q. Now from where you were working could you see the tower or framework in which the elevator hoist ran up and down? A. Yes, I could see it.

Q. About how far were those towers in which the elevator hoist ran up and down from the mixer? A. How far was the tower?

Q. About how far were they away, can you estimate that distance from where your mixer was? A. No more than the only thing I could in a statement I would say about 16 feet from where I have to roll over to the mixer right up on the platform.

Q. You were right at one of the towers? [1036] A. Right there where I loaded at.

Q. Was there more than one elevator or hoist there? A. There was one with a double drum.

Q. In other words, were there two elevators that separately worked up and down at different times? A. Yes, we used one and the other man used the other one on the other side. There was a double cage.

Q. Now were you assigned and using one of these two elevators? A. All we did use this one on the right hand side.

Q. That was on the right hand side, was it? A. Yes.

Q. Was that when you stood at the mixer and looked at the towers, was it on your right then? A. It was on my right.

Q. On your right. Now the other side, was that being used that morning as far as you can remember? A. The general contractor used that one.

Q. Was anybody else using the one on the right hand side except Izzo and his bricklayers? A. Nobody was using that mortar but me.

Q. No one else was using it? A. No.

Q. From where you worked that morning could you see the platforms that extended from the opening in the building [1037] out to the elevator hoist on the various floors? A. I could see all the way up.

Q. You could see all those platforms? A. Yes.

Q. Now from where you work could you see the location of the operator of this elevator that you were working with? A. Yes, I could see him.

Q. How far away was he located from where you were working? A. Well, I don't know exactly what it is.

THE COURT: Excuse me. Maybe you mean from where he mixed or from where he loaded, sir.

MR. LAMBERT: From where he mixed.

THE WITNESS: From where I mixed the mortar from?

BY MR. LAMBERT:

Q. Yes. A. I don't remember exactly about how far it was. It was sitting back a good little piece.

Q. What was he working in? A. What was he working at?

Q. Yes. A. He had a cage built you know for him. He had a machine back in there and he was sitting back in there.

Q. Was he in a covered shed or building? A. He had to have a cover on it to keep stuff from [1038] falling on him.

Q. So he was in a covered shed or building. Now standing at your mixer and looking toward the back of the building, in which direction was this building that the hoist or elevator operator was in? A. Like the house sitting there and the mixer here and the hut sitting back there straight down the side of the building.

Q. Which side, left or right of you? A. It would be the left.

Q. To your left. Was the little building beyond the structure of where the elevator ran up and down to your left? A. No.

Q. What do you call his place of work? A. We call it a shed.

Q. Was his shed then to your left as you looked at the back of the building from your mixer? A. Yes, all of it was sitting to the left.

Q. All to the left.

THE COURT: Let us mark these so we know what we are talking about please.

MR. LAMBERT: These have been marked as pre-trial exhibits.

(The matter referred to was marked [1039] Plaintiff Exhibit No. 10, for identification.)

(The matter referred to was marked Plaintiff Exhibit No. 11, for identification.)

BY MR. LAMBERT:

Q. Mr. Williams, let me show you a photograph of a shed or building or whatever you want to call it and see if you recognize that shed? A. This is it.

THE COURT: You do recognize it, sir?

THE WITNESS: Yes.

THE COURT: What do you recognize it as?

THE WITNESS: It looks like the same shed where they had built they had sitting back there that is where the operator was at.

[1040] BY MR. LAMBERT:

Q. I understand you to say that is where the operator worked? A. On the machine, the motor sitting back there.

MR. LAMBERT: I offer this in evidence.

THE COURT: Is there any objection?

MR. GREENEBAUM: No objection.

THE COURT: Without objection it is received.

(Plaintiff Exhibit No. 11 was received into evidence.)

* * *

BY MR. LAMBERT:

Q. Mr. Williams, can you describe for us what this hoist or elevator was made of and what it looked like? A. It was—well, I don't know. It has four corners. But it has steel.

Q. Four corners and steel? You mean a steel floor? A. No, it has a wooden floor.

Q. I am talking not about the structure in which it ran, but I am talking about the elevator car itself or the hoist that runs up in this steel structure? A. It was.

Q. Do you understand? A. Yes.

Q. Now, it has got a wooden floor more or less [1041] square, is it? A. Yes, four cornered.

Q. How thick is that wooden floor? A. It is thick.

Q. Is it supported underneath by anything? A. It has braces under there.

Q. Does this square floor that constitutes part of the hoist or elevator, does it have any sides to it as it runs up and down? A. Yes, it has sides.

Q. What are the sides made of? A. They got big iron braces on there and big steel wire. I call it steel wire on the side of it.

Q. Are they like tie rods? A. They have braces across and thick wire across. That too looks like steel.

Q. And they have wire on the outside? A. Yes.

Q. How high do the sides go up? A. I stand up in there, way up in there.

Q. Are you estimating five feet or more? A. Yes, sir.

BY MR. LAMBERT:

Q. Does it have a top on it? A. Yes, it has a top on it.

[1042] Q. What is the top made of? A. It is made out of the same stuff.

Q. By what means is it raised and lowered up and down in the tower? A. What do you mean?

Q. What causes it to move upwards in the tower? How does it move? Is it on a cable or rope or what? A. On a big cable.

Q. A cable. Affixed to the top, is it? A. Yes, and it takes it up and down.

Q. Now the day in question when the man was killed, was there anyone else working with you mixing mortar and sending it up to the brick people? A. There was one more fellow working down on the ground. But it has been so long I don't know his name. There were two of us working there.

Q. There was one more with you working with you, was there? A. Yes.

Q. But you don't know his name. Have you ever seen that fellow again? A. No, I have not seen him.

Q. Now just before the man fell to the ground or was hit, where were you at that time? A. I was standing up there on the platform. We [1043] were sending stuff to the penthouse.

Q. That was the platform I take it to load your mix? A. Yes, I was standing right there.

Q. Where were your men working at that time? A. All the way to the roof on the penthouse.

Q. On the penthouse? A. Yes.

Q. From where you were standing at that time could you see the operator of the elevator or hoist? A. Yes. I could see him.

Q. Could he see you from where he was? A. Yes.

Q. There is nothing between to bar your vision? A. No.

Q. Did you have a set of signals to indicate to the hoist operator what you wanted him to do with the hoist? Did you? What were the signals that you had to work with

there? A. Well, like if I worked I said it was second or third floor. If I worked on the second or third floor when I get that cage loaded – you don't have to ring no bell. He gets the load and pulls the gate down. You do like that and he knows what floor to stop it on.

Q. Did you have bell signals? A. He had bell signals on the floor for the men [1044] working up there.

Q. Could that bell be heard by you? A. Yes, it could be heard.

Q. Was it very audible, loud? A. Yes, it was loud.

Q. Now was there a different bell tone used for each of these hoists? A. Well, see, you got them on the other cage. You got two bells in there. The man on this side – that bell got a different tone from the one I used.

Q. The one you used had a different tone from the one the general contractor was using? A. yes .

Q. How far away could those bells be heard would you say? A. You can hear them a long way.

Q. All throughout the building, could you? A. Yes, sir.

Q. Now just before this accident occurred, did you hear any bell signals? A. I heard it three times when you send it down from the roof.

Q. What did that mean? A. Bring it down.

Q. Do you have a number one bell too, just one bell? [1045] A. No, like you are working on the floor and he rang that bell for it to come down. If you want to load something on the cage before you get there, you can pull it one time and you can stop.

Q. One bell means to stop. Is there a two bell signal? A. Yes.

Q. What does that mean? To bring it up, to send it up.

Q. That means send it up? A. In fact you are working on that floor and you wanted to send the cage up, you just pull the bell twice.

Q. Three bells brings it down? A. Brings it down.

Q. Is there a four bell signal? A. Yes, like you are up in the building loading. You have to load up your wheelbarrow, heavy load. You pull it four times. You know he got a load on there and to bring it down.

Q. That means you have a heavy load? A. To bring it down.

Q. Three bells, that means not a heavy load but the light load? A. Bring it all the way down.

Q. How do you signal or indicate to the hoist [1046] operator what floor you want to have it brought up to when you are sending it up? A. Well, like I say working on the fifth floor, when he gets the cage loaded, I am standing right there. When I get a load all I do is now up five fingers. He knows that goes to the fifth floor.

Q. You hold up five fingers. What do you do if it is going all the way up to the penthouse? You don't have that many fingers. A. But he knows when I do that, he knows you go to the roof. That is as far as he can go.

Q. So when you touch you head – A. That is all the further he can go.

Q. He knows that is the top of everything? A. It can't go no further.

Q. To give these hand and head signals you must be within the eyesight of the hoist operator? A. Looking right at him.

Q. He cannot see all the way up, can he? A. No, he cannot see all the way up.

Q. Because that top is over him? A. Yes.

Q. Now you said I think that you heard three bells when you were over there just before the accident. Do you know from what location that signal came? [1047] A. It came from the roof.

Q. The penthouse? A. Yes, the penthouse.

Q. To your knowledge was there anyone else working on the penthouse but Izzo and his men using this particular joist and bell? A. They were using it.

Q. There was no one else using it that morning? A. No.

Q. Only Izzo and his men? A. That is right.

Q. And the signal to bring it down came from this penthouse by giving three rings and down it came, is that right? A. That is right.

Q. Now after you heard this signal from the penth[illegible] did you have occasion to look up at all and observe anything? A. Like I said, when you go out I have been around there so long -- when I work -- when he hits that bell, I look up.

Q. And then what did you see when you looked up on the occasion just before the man fell? A. When I looked up, after he rang, the cage was coming down. I did not see nobody. I looked up and when it [1048] got to about the 11th floor, that is when I looked and saw this man, like he were hanging. I could not see nothing but his feet. It scared me so bad I just come hollering, "Hold it. Hold it."

Q. Tell me where you saw the man exactly in relation to the floor of the elevator? A. I do not know. That thing -- when I saw him -- when I saw him like this, here is the cage. When I looked up I could not see nothing but his leg part and this part here was bent over like this.

Q. Which way was he facing? A. Back like he was facing back this way.

MR. GREENEBAUM: I hate to interrupt. Could we have the record indicate when he indicated this part --

THE COURT: Mr. Witness, would you do that again so we can get the record. I understood you to say you did see the man's feet?

THE WITNESS: Yes.

THE COURT: And you said it looked like he was bent. Now show the jury how he was bent, please?

THE WITNESS: Like this here, the cage and runway here, coming out to the building, coming onto the cage. When I looked up it looked like this, the runway, this hoist coming here. I could not see nothing but this part. He was bent over, this part here.

[1049] THE COURT: Indicating the witness is bending forward. You say at that time he was facing toward the building?

THE WITNESS: I could not see nothing but this part. He was facing back toward the runway.

BY MR. LAMBERT:

Q. Toward the runway and toward the building? A. Yes

Q. How much of him could you see dangling down below the joist? A. I could just remember now, I know I could see some part right in along here.

Q. Now you point around to the base of your chest – your belt line?

THE COURT: Is that your hand at your belt?

THE WITNESS: My belt.

MR. LAMBERT: The belt line then.

BY MR. LAMBERT:

Q. What did you do when you saw the man dangling up there between the elevator floor and the platform? A. It scared me so bad I come hollering to the operator, "Hold it. Hold it." I could not stand to see the man hit the ground. I broke and run through the alley.

Q. Did the operator stop the cage? A. I hollered hold it and he stopped.

[1050] Q. Was it not already stopped when you saw him pinned and dangling? A. He was coming down with the cage. There was nobody on that floor to stop him.

Q. Was he underneath? A. I don't know how he got caught. But this part here was the only thing I see.

Q. When you say you were frightened and disturbed of course by seeing such a thing, did you give any other direction to the hoist operator? A. No more than waving my hand and telling him to hold it.

Q. Did you not tell him to raise the cage? A. I did not tell him to raise the cage. I just hollered to hold it.

MR. STEWART: I object. I think he is attempting to lead the witness.

THE COURT: Try not to lead him. This is an important part.

BY MR. LAMBERT:

Q. Let me ask you this, Mr. Williams: Did there come a time after that that you were intereviewed by some gentlemen from the Homicide and Safety groups of the District

of Columbia? A. It has been so long. I just remember it. I [1051] know there were a couple of fellows around there.

Q. Did there come a time after that that you made and signed a statement about how this thing happened and what you had done in connection with it? I have not had an answer to that question.

(At the bench.)

MR. STEWART: Your Honor, this perhaps might be a little anticipatory, but I gather that Mr. Lambert is now contemplating an effort to impeach his own witness and I object.

THE COURT: I would assume not. If he is going to try to do anything, it is to refresh his recollection. We will deal with the second part later.

MR. LAMBERT: I want to see if it does refresh his recollection.

MR. ATTRIDGE: May I see that, please?

THE COURT: What exhibit are we talking about now?

DEPUTY CLERK: Plaintiff Exhibit No. 9.

(Off the Record.)

(Open court.)

BY MR. LAMBERT:

Q. I do not remember whether you answered my question as to whether you remembered signing a statement on or about the day of the accident? [1052] A. Like I say it has been a while ago. That was the only thing I recall that is all I said. I could not have said, "Raise the cage." The only thing like you ask me then was to hold the cage and bring it home.

THE COURT: I think what he is asking you is did anybody write that down for you or did you see a paper saying what you did say, do you recall?

THE WITNESS: I just don't remember.

BY MR. LAMBERT:

Q. You cannot remember. Let me show you this paper and I ask you first to look at that writing at the bottom, is that your signature? A. Yes, that is mine.

Q. That is your signature? A. Yes.

Q. Would you read what you signed there?
THE COURT: Read it.
MR. LAMBERT: And see if that –
THE WITNESS: I cannot do too much reading at all.
THE COURT: Can you read, sir?
THE WITNESS: No.
THE COURT: Let me suggest this. This is about the morning recess. Let me suggest all counsel give him an opportunity so he can know what the content is while we are [1053] in recess.
MR. STEWART: Your Honor, if he cannot read, is the Court suggesting that we read it to him?
THE COURT: I suggest you read it to him to see if his recollection is refreshed.
You did write that statement, did you, sir?
THE WITNESS: No.
THE COURT: That is your signature. We will recess for ten minutes.
(A short recess was taken.)
(At the bench.)
MR. LAMBERT: If Your Honor please, he has had the statement read to him. He does not recall the contents of it and does not remember that he ordered the hoist raised. But to the best of his recollection al he said was to halt the hoist.
THE COURT: Since it was close to the time of the accident and was probably identified in here, I would like to put it in.
MR. STEWART: Your Honor, we are dealing with a statement supposedly of a man who cannot read. Now I hear him respond to Mr. Lambert after Mr. Lambert read the statement to him. He did not say to take the hoist up. As a consequence something of this nature could be very prejudicial in that it might be interpreted as proving the substance of [1054] the statement whereas as I understand it Mr. Lambert proposes to use it for a purpose of impeachment of his own witness. This witness has not been proven to be hostile.

THE COURT: He certainly has not at this point.

MR. STEWART: I think he is bound by the testimony of this witness. I think he should not be permitted in effect to impeach the witness.

THE COURT: You have read the statement to him?

MR. LAMBERT: Yes.

THE COURT: And he says he has no recollection of having said –

MR. LAMBERT: Anything except to halt the hoist.

MR. STEWART: I might say further to Your Honor this man's deposition was taken and in his deposition he said the same thing he has testified to on the stand, that is hold it, man, hold it. He was asked in his deposition if he did not order the hoist to be raised and he said no. So this is not a matter of surprise to counsel putting this witness on the stand.

MR. LAMBERT: Humphrey testified the same way. The statement reads that he was ordered to raise the hoist and he raised it two or three feet. He testified that. This witness does ot recall it. But this is something he signed right on the day of the accident. I think it should be admissible as a matter of direct evidence myself. I think it [1055] is part of the record of the District of Columbia safety program taken and kept in the normal course of business and it has his signature.

THE COURT: That is not the question which I have at the present time, sir. I understand this document is being presented to the man who admits he cannot read, a document which he did not write and when it was read to him by counsel he says he has no recollection of giving such a statement. I does not refresh his recollection. You have a right to impeach your own witness? That could be the only other result. Furthermore, is it not merely accumulative?

MR. LAMBERT: This man has been working for the plaintiff for some either years and still I think is under his employ and I think under these circumstances there should be latitude.

THE COURT: Frankly, I am familiar with the rule to which reference is made anticipatory to him taking the stand and I would be less than frank if I said that I never saw a better witness or person from my personal point of view who was trying to answer questions better than this man. He struck me as being a very honorable man. But technically short of showing him as biased or prejudiced there has been close cross examination of the witness called by you. I do not know how this could be introduced so I will sustain the [1056] objection at this time.

MR. LAMBERT: I would like to offer at this time this part of the official record taken by the Safety Division in the District Government.

THE COURT: Let us finish one witness at a time and come back to this. I am not foreclosing you as to that feature at all.

(Open court.)

BY MR. LAMBERT:

Q. Mr. Williams, how long had you worked on the job at the time of the accident, how long had you been working on that job?

THE COURT: That morning or all together?

MR. LAMBERT: All together. Not just that morning, but when did you come on the job?

THE WITNESS: We were the first ones that got there to start the job.

THE COURT: How many days or months or weeks had you been there before this occurrence, if you know, took place, approximately?

THE WITNESS: I cannot remember right now.

BY MR. LAMBERT:

Q. Did you continue to work on this job after the accident? A. Yes, I worked there.

[1057] Q. How long after the accident did you continue to work there or can yo tell us? A. Until just about finish.

THE COURT: Do you know when that was?

THE WITNESS: No.

BY MR. LAMBERT:

Q. Now you say you went there when they were putting in the footings? A. No, we went there with the brick work.

Q. With the brick work, when they were putting in the brick work below ground? A. We were the first ones starting there with the bricks.

Q. That was below ground? A. We don't work down there. Below, you don't work below ground with a basement.

Q. The brick work started at the first floor? A. Approximately down and bricks up the first floor

Q. From the time you first went to work at this job were you working on the cement mixer that you located across the alley? A. Yes.

Q. You were working at the ground level on the day of the accident? A. Yes.

[1058] Q. You worked at the ground level prior to the accident, did you not? A. Yes, I worked there all the time.

Q. You never worked on the upper floors? A. No, I worked on the ground.

Q. Your job was down on the ground mixing the cement and then sending it up in the hoist? A. Yes.

Q. That is what you did the whole time you were working there? A. Yes.

Q. How long had you had occasion to work with the hoist operator before the day of the accident, the one that was there on the day of the accident, do you know? A. No, I don't remember. I just remember he was there.

Q. Would you keep your voice up? A. I don't know what you are talking about.

Q. Do you know who the hoist operator was on the day of the accident? A. I cannot recall him by his name.

Q. But you knew him? A. Yes, I knew him.

Q. You say him? A. Yes, I saw him.

[1059] Q. That was not the first day you ever saw him? A. No, that was not the first day.

Q. How long before that had you had any occasion to see that hoist operator, approximately? Was he on the job

the whole time? A. He was out there now when we started the job. There were two or three operators that were there. When he came I left, I left him there.

Q. You left him there? A. Yes.

Q. Had he been on the job any apprecible time before the day of the accident or not? A. Yes, he was there.

Q. Had he been on a month, would you say or two months, can you estimate at all? A. I just don't remember right now.

Q. But he was there you are sure before the day of the accident? A. Yes, he was there.

Q. So you and he then were frequently giving each other signals or you were giving him signals and he was following your signals for a long time before this day and a long time after this day? A. We did that until we finished the job.

MR. LAMBERT: That is all.

[1060] CROSS EXAMINATION

BY MR. GREENEBAUM:

Q. Mr. Williams, when you were on the ground and you looked up and you saw this incident taking place with Mr. Bowman trapped or pinned or wedged or however you wanted to call it, did you have a clear view of the outside of the building? A. yes.

Q. Could you see all of the holes leading out to the ramp on each floor as you looked up? A. Every one of them.

Q. Directing your attention now to the hole that was ne nearest the place where the hoist cage was with Mr. Bowman. Could you see the bar that was in place there?

MR. LAMBERT: I object. I would like to approach the bench.

(At the bench.)

MR. LAMBERT: It is beyond the scope of my examination and I think this scope should be strictly adhered to. I did not go into any safety appliances with him. If they want to go into it they should call him on his own case. I

don't believe there is any reason to extend the cross examination to include things that I have not gone over.

MR. GREENEBAUM: The testimony has been as to [1061] what he observed when he looked up from the ground.

MR. DRIESEN: Accuracy when he made that observation is relevant.

MR. GREENEBAUM: We are trying the liability in this case, Your Honor, and I think I should be given the right to cross examine this witness and develop the facts.

THE COURT: You certainly have a right to cross examine. The question is whether this is appropriate examination in light of the direct examination in the case.

MR. GREENEBAUM: I did ask what he observed when he looked up.

THE COURT: I will permit it. I find the same thing.

(Open court.)

BY MR. GREENEBAUM:

Q. When you looked up, Mr. Williams, at the hole of the entrance in the building where this man was with the cage, did you see the safety bar across that building? A. It was across there.

Q. And across there you mean running straight across? A. At that entrance. I see the two sides when you are standing where I am standing you can see the floor and that bar was down.

Q. When you mean the bar was down – [1062] A. It was fastened.

Q. And you could see that clearly from where you were on the ground? A. Yes.

Q. Now on days when it rained and things like that you worked inside the building, did you not? A. Some days. Some days I worked in and sometimes I came home.

(At the bench)

MR. GREENEBAUM: I do not want to ask an improper question if I can avoid it. I would like to ask this witness on his observations when he was in the building prior to the time of this occurrence that he saw the Belco (bell code) System. I know he has not been asked anything about it.

THE COURT: I sustain the objection to that.
MR. LAMBERT: I make an objection.
THE COURT: All right, it is sustained.
(Open court)
BY MR. GREENEBAUM:
Q. When you looked up at the building, could you see whether there were gates or parts at the other entrances coming out of the building all the way up? A. All the way up.
Q. They were there? A. All the way up.
[1063] MR. GREENEBAUM: That is all.

CROSS EXAMINATION

BY MR. STEWART:
Q. Mr. Williams, the cage that goes up and down in this shaft, do you have any idea how much that weighs? A. No. I don't know how much it weighs, but I know it is heavy.
Q. On this particular morning when this accident happened, was any other contractor using the other cage? A. The general contractor was using it while they were using the other side over there.
Q. Do you know what was being carried in that other cage? A. I think they were pouring a little cement around up there or something like that.
Q. Where was that being done? A. They were working all over the floors but I just don't remember what floor. Then they would bring stuff up to the penthouse and up onto the roof.
Q. Do you remember whether there were men, other men beside Mr. Izzo's men up on the roof or on the penthouse area? A. I cannot tell. You see I was on the ground. I know the man I was working with was up there. But I could not tell who else was up there from way down there.
[1064] Q. When this cage stops, this particular cage stopped at a floor on this building, so that material can be unloaded, is there any opening between the floor of the cage and the platform? A. No. There was nothing out there but platform and guardrails on the side

Q. But between the edge of the platform and the edge of the cage, is there any space? A. The only space you have is about like that so a wheelbarrow will not hit down there, about eight inches, not quite, hardly eight.

MR. STEWART: That is all I have. Thank you.

CROSS EXAMINATION

BY MR. ATTRIDGE:

Q. Mr. Williams, when you were looking up the tower or the shaft where this lift goes up and down, and was that a distance away from the building? A. I just remembered just about how far it is. What do you mean by where the cage is sitting at?

Q. When you have the tower that the cage goes up and down in and that is as I understand on the rear of the building, is that correct? A. yes.

Q. Then the back part of the building? A. Yes.

[1065] Q. Between the edge of the building where the brickwork stops and the tower is, is there anything connecting that in order that someone could go from inside of the building out into the cage of the elevator? A. You have the platform that you go out on.

Q. You go out on the platform? A. Yes.

Q. Do you know how far out from the edge of that building that the platform extends until you get on the cage? A. I don't know. I just cannot imagine. I would say close to around about three feet.

Q. About three feet? A. Yes.

Q. That is your estimate? A. yes.

Q. What would you estimate three feet to be? Can you show us something in the courtroom? A. I guess something about from here to right along in here.

Q. That would be from the edge of the building out to where? A. The edge of the building like this here, like you're inside the building. This coming out here, the cage coming up here, the runway going out this way. You got six [1066] wires coming out and that is a ramp.

Q. Then you estimate that to be three feet? A. About three feet.

Q. What would you estimate on that table? A. About three feet.

MR. GIONFRIDDO: I have no questions.

REDIRECT EXAMINATION

BY MR. LAMBERT:

Q. Mr. Williams, immediately after the man fell, what did you do?

THE COURT: I think he answered you as to that, sir.

MR. LAMBERT: I want to go a little further, if I may. It is in connection with something on cross.

THE COURT: What makes this redirect, sir? Is this something you forgot?

MR. LAMBERT: No, I do not believe so. I think it will be in relation to some of the cross, if Your Honor please.

THE COURT: Then it is redirect. If it is, you certainly may ask. But I do not know what it is. I will permit it. Go ahead.

BY MR. LAMBERT:

Q. What did you do after this man fell? A. After he fell, when he was falling I could not [1067] stand to see the man hit the ground. I broke and run. I ran around the back of the building and started around the ramp.

Q. Did you go up to the 12th floor that day after the accident?

MR. GREENEBAUM: I object to that beyond the scope of the examination.

THE COURT: I think it is.

MR. LAMBERT: He has given a right to observe things—

THE COURT: Did you go up to the 12th floor?

THE WITNESS: No, I did not go up there.

BY MR. LAMBERT:

Q. How long after the accident was it before you ever went to the 12th floor? A. I don't remember. I was the ground man. I stayed on the ground.

Q. You never went up and examined the bars or whatever you say was across the opening? A. I stayed on the ground. But I can stand up on the ground and look up and see they were fastened.

Q. Now at the time of the accident, if I understand you correctly, you were on the platform where you had lowered the mortar onto the elevator or the hoist? A. Yes.

[1068] Q. Was that load between the elevator shaft and the building or on the other side? Where does that lower? A. You have the cage setting there.

Q. The cage you are pointing to would be the desk in front of you? A. This is, there is the cage I am loading. All this is equipment back here. My ramp comes up here and comes up on that platform and the cage comes in here. As I load the cage up I send it on upstairs.

Q. Then I understand you load the cage car? A. Right.

Q. Do you load the side that is next to the building or one of the other three sides when you load it? A. I do not know what you are talking about. This cage I say has four corners. You can put bars on it. Well you got one on this side and one on this side and one in the middle.

Q. Is the opening to put the three wheelbarrows on it next to the building and one on the other side? A. Yes.

Q. It is next to the building. You are coming out the building to the ramp and you load the cage back up. At the point of loading, Mr. Williams, would you be almost directly underneath all of these ramps that run out from the various floors of the building? A. I will be right up under them.

[1069] Q. Would they be right above you where you load the hoist or not?

THE COURT: I thought he said that he would be right under them.

THE WITNESS: I am as far from the cage when I send the stuff as when I sit here from here to that table.

THE COURT: What is right over your head?

THE WITNESS: Going up over my head, there is nothing but that cable going up.

BY MR. LAMBERT:

Q. As you look up from that position where are these ramps that hung from the building floors out to the hoist, are they up above your head? A. They are all up at each floor.

Q. Now standing there how many of the openings can you see? Are not the ramps in your way of looking up? A. I can see every one of them.

MR. GREENEBAUM: I object.

THE COURT: I do not think you object to the answer. He said no, they were not in his way.

BY MR. LAMBERT:

Q. Were you paying any particular attention to the openings and how they were safeguarded? A. I could see the bars across.

[1070] Q. Were you paying any particular attention, was that part of your job to? A. Every time I turn around I am looking up there to see how everything is.

Q. You looked up there every time you come around there? A. Standing there, so I can look up there.

Q. Was it part of your duty or part of your job? A. That is part of my duty right there to see it on the ground, to look up and see those bars there.

Q. Do you ever make any report to anybody about what you see? A. No.

MR. LAMBERT: I think that is all, if Your Honor please.

MR. GREENEBAUM: I have no further questions.

MR. STEWART: I have no further questions.

MR. GIONFRIDDO: I have no further questions.

(Witness excused.)

MR. FURLOW: We have no other witnesses, but we would like to introduce the safety regulations. Your Honor, we want to introduce the District of Columbia Safety Standard Rules and Regulations as to construction. They have been stipulated to in the pre-trial.

* * *

[1072] THE COURT: I understnad that these two sections are in evidence. That is as to Defendant Redding & Company. I am sure you will deal with that later.

* * *

PROCEEDINGS

[1103] [The following proceedings were had out of the presence of the jury.]

THE COURT: Gentlemen, first, as to a preliminary matter. Over the weekend, looking at my notes, I found that the autopsy report had not been marked for identification, and I similarly found that the Certificate of Death had not been marked for identification.

Reference was made to both of those documents and I think for the plaintiff's protection on the face of the record they should be market for identification.

* * *

[1110] MR. LAMBERT: After I left on Friday, and it kept me awake a little bit—do you remember when I was up to the bench requesting use of that signed statement by the Leonard Williams' witnesses? And I wanted to offer that signed statement at the time, not only for refreshing recollection of that particular witness but also wanted to put it in as part of the books and records of the Safety Division at that time.

THE COURT: Will you say the last thing again, please, sir?

MR. LAMBERT: I wanted to put it in as a piece of direct evidence of what occurred here as a part of the books and records and official documents of the Safety Division of the District of Columbia.

And Your Honor said, "Let's deal with this—you [1111] can do that later as a direct proffer—but let's deal with this statement," which the witness signed, "as a refresher to the recollection," or something to do with that particular witness.

Then I went off and I forgot about offering that as a direct piece of evidence.

THE COURT: If I recall, sir, actually, what transpired in connection with that was this statement was presented to the witness. . .

MR. LAMBERT: Leonard Williams.

THE COURT: . . . Williams. . .

MR. LAMBERT: Yes, sir.

THE COURT:. . . and that the witness Williams indicated having signed the document, but he said that he could not read it. . .

MR. GREENEBAUM: That's right.

THE COURT: And that in order to see or to give him the opportunity or the benefit of the content thereof, I suggested to all counsel that they, in the absence of the jury, meet with the witness Williams and you all did meet with Williams.

After such meeting, you, Mr. Lambert, I believe, stated for the record that you had met with him with other counsel, it had been read to him, and I believe in substance, at least, you said that it did not refresh his recollection.

[1112] Mr. Lambert: Correct.

THE COURT: And then you made other very honorable statements at the time as to which I will let the record speak for itself.

At this specific time, so that it will be complete, it is my understanding that that statement was marked for identification.

MR. LAMBERT: Yes, it's in.

THE COURT: So the sole question now is whether that should be received in evidence at this time.

MR. LAMBERT: And whether it should have been offered– that is, I mean, as direct evidence at that time.

THE COURT: Well, let me say this to you: I can see how you would be in the position you are, in light of what I said. I will take the exhibit and look at it along with these other documents at this time.

MR. LAMBERT: All right.

It's not as if it were a new piece of evidence that Your Honor hasn't already before you. It's because you remem-

ber the witness, Mr. Humphrey, testified clearly that he had gotten a direction from Williams to raise the hoist.

So It's in there. It's not, by any means, fatal, but. . .

THE COURT: I read all those notes last night and it is in Humphrey's statement that he did receive a signal [1113] to raise it and he did, in fact, so comply.

I think it's unimportant, but I'll take a look at it again.

MR. LAMBERT: All right.

Thank you, Your Honor. I just didn't want to overlook it if I shouldn't.

THE COURT: That's all right, sir.

To return of Court, 12:00 o'clock.

THE DEPUTY CLERK: Plaintiff's Exhibits Twelve and Thirteen marked for identification.

[Autopsy report and death certificate, marked Plaintiff's Exhibits Numbers 12 and 13 for identification.]

[Whereupon, the Court recessed at 10:40 a.m.]

Judge Keech

[1114] THE COURT: We have now before the court motion for directed verdict by the defendants Redding and Izzo, made at the conclusion of plaintiff's case as to liability Defendant Redding has also made motion to strike relating to two industrial safety regulations.

Decedent, an experienced apprentice caulker, [1115] qualified to be a mechanic. Except for union requirement of having to serve three years, he would have been a mechanic. He was sent by his employer's foreman to a job at 1025 Vermont Avenue and was told to go to the twelfth floor and await foreman's return with caulking material, none being at the site.

Caulking of windows was done from the inside of building; therefore, there was no requirement for decedent to have left building and go outside to platform leading to hoist in connection with his work.

Hoist was not used for bringing in caulking material to the floor where caulking was to be done; nor was it ever used in this connection.

Decedent's foreman specifically testified that the materials were carried to the job on all occasions. The record is completely silent as to how and why decedent left his place of safety and got to the side where he was pinned between cage and platform and subsequently fell to the ground.

Serious legal question is presented as to deceased's status when migrating from the site of his anticipated work to another area – one not required to be traversed even to get to or from his place of work.

As I said, serious question is presented on the evidence before the court. Would there have been any duty on Redding if deceased had gone to the roof or penthouse? [1116] Did either or both of the defendants violate any duty? and if so, in what manner were they negligent?

First, as to the defendant Redding. The only evidence of negligence related to two industrial regulations; One, to have "bolted or hinged" bar, a part of one of the regulations, there being no evidence of failure to comply with said regulation in other respects. Second, a failure to post conspicuously a signal code.

There was evidence of a bell, indeed, a larger bell than often found, and one audible throughout the building and, as one witness said, "as far as L Street", the theory of plaintiff being that if the code was posted indicating "X" bells for down and "X" bells for up, the deceased would not have been pinned by the downward cage.

The Court, indulging in all inferences favorable to the plaintiff, has determined that a jury could find a violation of the two provisions referred to.

The next issue for resolution is whether there was evidence on which the jury could, without merely speculating or conjecturing, find that either or both of the assumed violations was a proximate cause of the pinning and fall leading to deceased's death. Without such a conclusion, the court would be constrained to grant the motion for directed verdict.

This case bears a strong resemblance to pronouncement of our Court of Appeals in the Washington Properties [1117]

case, 76 U. S. Appeals D. C. 43, where it was held there was failure to establish proximate cause even assuming negligence.

Here, it was broad daylight with the hoist cage at penthouse or top level – one floor, or immediately above the twelfth floor where pinning occurred – with but one way for it to go–down–with bell sounding loudly (no showing that the decedent was deaf or had impaired eyesight, and there being a large hoist at the end of the platform which extended three feet from the building with an eight-inch clearance between the cage and the end of the platform).

Could a jury of reasonable men say without speculation or conjecturing that the absence of "hinged or bolted" bar (for how long, not shown) and mere failure to post signal code in conspicuous place were proximate causes (1) of decedent's being pinned where he may have received injuries resulting in his death or (2) of his subsequent fall with resulting injuries which may have caused death?

There was no evidence as to how or why decedent left the building, traveled platform three feet, and encroached upon the eight-inch clearance for the cage in order for him to have been where contact with cage was possible. The court is of the view that for the jury to so find would require pure speculation or conjecture.

Counsel for the plaintiff seek to fill this void by urging that the violation of named safety regulations [1118] not only constituted negligence but supplies evidence of proximate cause. This is not the law in the District of Columbia as this court understands it. To make a defendant liable to respond in damages, there must be evidence permitting not only a finding of negligence but also a finding that such negligence, whether by breach of common law definition of negligence or violation of safety regulations, was a proximate cause of accident and resulting injuries and death.

Defendant Redding, as a further basis for its motion for directed verdict, claims that the decedent was contributorily negligent as a matter of law in going from a point of safety inside the building traversing platform extending

three feet to point within eight inches of cage, or hoist, and then encroaching on the eight-inch clearance area between the end of the platform and the case in broad daylight at a known twelfth-story elevation, particularly as to deceased, who was a man experienced in construction work, and without any shown purpose in connection with his work.

The court is constrained to grant defendant Redding's motion for directed verdict on three grounds: (1) There is no evidence showing the defendant Redding violated any duty owing to the decedent under the existing circumstances as to the area where he came in contact with the cage of the hoist. His work did not require that he leave [1119] the building, nor was any person permitted to ride hoist, nor did decedent or his employer obtain their materials by hoist or the platform in question, nor was decedent required to travel the area in question in coming to or leaving his place of work. (2) Assuming sufficient evidence as to violation of the two safety regulations, there is no evidence on which jury could without speculation or conjecture find such violation or violations to have been a proximate cause of the decedent's death. (3) Under all the facts and circumstances in evidence, decedent was contributorily negligent as a matter of law, and I refer specifically to the recent Neff case in our Court of Appeals.

Now, as to the motion of defendant Izzo. Under the evidence presented by plaintiff and applicable law as pronounced by the Supreme Court and our Appellate Court, no negligence of the defendant Redding could be charged to defendant Izzo on the borrowed servant doctrine. It follows, therefore, that if defendant Izzo is to be held liable, plaintiff must show that an agent of Izzo acting within the scope of his employment was negligent and that such negligence was a proximate cause of decedent's death.

What other evidence (except that relating to Redding) of negligence was shown as to the defendant Izzo? There was evidence that it was the duty of Leonard Williams, laborer and employee of Izzo, to mix mortar, put in wheelbarrow,

[1120] roll on hoist, and then signal employee of the defendant Redding, who would send the cage or mortar to the predesignated level. This witness testified that he could see the platform at the top and bars were in place. As the witness looked up and saw the cage come down around the eleventh floor, saw a man's legs hanging and the body bent over, he yelled for the operator to "hold it."

The hoist engineer, Robert L. Humphrey of Redding, testified that the cage went up to the penthouse, twelfth floor, signaled after unloading, three bells were sounded, cage started to move down when Williams saw a man, yelled "Hold it, raise it!" He did immediately raise the cage up a little, up two feet, "dogged it off" by putting a latch in gear, and in seconds the man hit the ground.

In the course of plaintiff's argument in opposition to motion for directed verdict, counsel mentioned that the court, on objection of defendant's counsel, refused to receive autopsy report and certificate of death. To the extent that these documents were legally usable, on objection of opposing counsel, all the facts therein were already in evidence by stipulation or otherwise. There was no challenge of the fact that the decedent was pinned and that, when the cage was raised, he fell to the ground.

There was no proffer of evidence interpreting the autopsy report and death certificate which would show [1121] whether the injuries which resulted in death were attributable to pinning or to the fall.

Thus on the evidence on the one alleged act of negligence which could be charged to Izzo, through the act of Leonard Williams, a jury could only speculate or conjecture as to whether such act was a proximate cause of decedent's death. For even assuming that Williams, Izzo's employee, in signaling Humphrey to raise the cage, was negligent, Izzo would not be liable to respond in damages for the death of the decedent, as there is no evidence on which a jury could reasonably find whether the decedent died from injuries received by pinning between cage and platform (thus

died before fall) or whether he died from injuries incurred by the fall after being released from pinning, rather than from the pinning.

Defendant Izzo's motion must be granted on two grounds: (l) There is no showing that any act of Izzo's employee was a proximate cause of injury to decedent resulting in his death. (2) Under all the facts and circumstances in evidence decedent was contributorily negligent as a matter of law.

There remain two things: One is the question of receipt into evidence of a statement, Plaintiff's Exhibit Nine, which was admittedly signed by the witness Leonard Williams. He stated that he did not write the [1122] statement and, furthermore, that he could not read. With all counsel present, the statement was read to the witness and outside the jury's presence, and this witness said it did not refresh his recollection. This is well stated on the record by Mr. Lambert, and I rest on the record.

This particular exhibit was of no importance in view of the action on the court in granting the two motions for directed verdict.

With that, the next step is to call in the jury for the purpose of having the clerk receive directed verdict.

Plaintiff's Exhibit No. 9

3-7-64
Leonard Williams
1117 Morse St. N.E.
Lib [illegible]

I heard [illegible] ring for cage #[illegible] to come back down in ground level. I rolled wheel barrow over to cage entrance and looked up. I saw Bowman apparently jammed between cage and landing. His face, chest and legs were below cage. I hollered to Mr. Humphrey to raise cage. [illegible] there was [illegible] jammed by cage. When cage [illegible] raised I saw Bowman start to drop and I ran to call for ambulance.

Leonard Williams

PLAINTIFF'S EXHIBIT
#9 id

died before fall) or whether he died from injuries incurred by the fall after being released from pinning, rather than from the pinning.

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This particular exhibit was of no importance in view of the action on the court in granting the two motions for directed verdict.

With that, the next step is to call in the jury for the purpose of having the clerk receive directed verdict.

Plaintiff's Exhibit No. 9

3-9-64
Leonard Williams
1117 Moore St. N.W.
Lib: [illegible]

I heard [illegible] ring for cage #1 to come
back down in ground level. I rolled wheel
barrow over to cage entrance and looked up
I saw Bowman apparently pinned between cage
and landing. His lower chest and legs were below
cage. I hollered to Mr. Humphrey to raise cage
I then was [man] pinned by cage. When cage
was raised I saw Bowman start to drop and
I ran to call for ambulance.

Leonard Williams

PLAINTIFF'S EXHIBIT
#9 -id

Plaintiff's Exhibit No. 12

CORONER'S OFFICE, DISTRICT OF COLUMBIA

AUTOPSY REPORT

Case No. 30-535 Date of Autopsy: March 9, 1964 Hour: 1:00 P.M.
Name: James Lloyd Bowman
Address: 121 Galveston Place, S.W., Washington, D. C.
Color: White Sex: Male Age: 21 Weight: 160 lbs Height: 5'9"
Date of Death: March 9, 1964
Pronounced by: Dr. Haddad
Place of Death: 725 Vermont Ave., N.W. (Dead on Arrival Washington Hospital C
Identified by: Thomas D. Bowman
Identified to: R. M. Worrell of D. C. Coroner's Office
History: Fell 12 stories

Clinical Diagnosis: Multiple injuries

Anatomical Diagnosis:
Fracture dislocation of cervical spine
Multiple rib fractures
Fractured liver and spleen
Hemothorax (Right)
Fractured pelvis
Fractured right femur

Histopathology:

Toxicology: Alcohol - negative

Summary and Final Diagnosis:
Cause of Death: Multiple injuries
Ruled Accidental

L. Ray Lord

Plaintiff's Exhibit No. 13

VITAL STATISTICS SECTION

1964 MAR 10 AM 9

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC HEALTH

CERTIFICATE OF DEATH

File No. 64 1998

1. PLACE OF DEATH

Washington, D. C. — NAME OF HOSPITAL OR INSTITUTION (If not in hospital, give street address): 725 Vermont Ave. N.W. — LENGTH OF STAY IN Washington, D. C. / Hospital

2. USUAL RESIDENCE (Where deceased lived. If institution: Residence before admission)

a. STATE: District of Columbia — b. COUNTY — c. CITY, TOWN, OR LOCATION: Washington D.C

d. STREET ADDRESS: 121 Galveston St. S.W. — e. IS RESIDENCE INSIDE CITY LIMITS? YES ☑ NO ☐ — f. IS RESIDENCE ON A FARM? YES ☐ NO ☑

73-7 3. NAME OF DECEASED (Type or print) First: James Middle: L Last: Bowman — 4. DATE OF DEATH Month 3 Day 9 Year 1964

5. SEX: Male — 6. COLOR OR RACE: White — 7. MARRIED ☑ NEVER MARRIED ☐ WIDOWED ☐ DIVORCED ☐ — 8. DATE OF BIRTH: 5/17/1942 — 9. AGE (in years last birthday): 22

10a. USUAL OCCUPATION: Caulker — 10b. KIND OF BUSINESS OR INDUSTRY — 11. BIRTHPLACE (State or foreign country): N. Carolina — 12. CITIZEN OF WHAT COUNTRY? U.S.A.

13. FATHER'S NAME: Jake E. Bowman — 13b. MOTHER'S MAIDEN NAME: Florence Tillery — 14. NAME OF SURVIVING SPOUSE: Betty Bowman

15. WAS DECEASED EVER IN U. S. ARMED FORCES? — 16. SOCIAL SECURITY NO. — 17. INFORMANT: Betty Bowman — RELATIONSHIP TO DECEASED: Wife

23 18. CAUSE OF DEATH (Enter only one cause per line for (a), (b), and (c).)

PART I. DEATH WAS CAUSED BY:

IMMEDIATE CAUSE (a) Shock

Conditions, if any, which gave rise to above cause (a), stating the underlying cause last. DUE TO (b) Multiple Injuries

DUE TO (c) " "

PART II. OTHER SIGNIFICANT CONDITIONS contributing to death but not related to the terminal disease condition given in Part I (a)

INTERVAL BETWEEN ONSET AND DEATH

19. WAS AUTOPSY PERFORMED? YES ☐ NO ☐

MEDICAL CERTIFICATION

20a. ACCIDENT ☑ SUICIDE ☐ HOMICIDE ☐ — 20b. DESCRIBE HOW INJURY OCCURRED: [illegible] fell [illegible] 12 floors while working

20c. TIME OF INJURY Hour Month Day Year: 3-9-64 — [illegible] Bldg 1725 Vermont Ave N.W.

20d. INJURY OCCURRED While at Work ☑ Not While at Work ☐ — 20e. PLACE OF INJURY (e.g., in or about home, farm, factory, street, office bldg., etc.) [illegible] Bldg — CITY, TOWN, OR LOCATION / COUNTY: Washington — STATE: DC

21. I attended the deceased from ____ to ____ and last saw ____ alive on ____. Death occurred at ____ on the date stated above; and to the best of my knowledge, from the causes stated.

22a. SIGNATURE [signature] M. D. — 22b. ADDRESS D. C. CORONER'S OFFICE — 22c. DATE SIGNED 3/9/64

23a. BURIAL, CREMATION, REMOVAL — 23b. DATE [illegible] — 23c. NAME OF CEMETERY OR CREMATORY [illegible] — 23d. LOCATION (City, town, or county) (State) [illegible] Va

24. FUNERAL HOME [illegible] — UNDERTAKER'S SIGNATURE [illegible] — 25. UNDERTAKER'S REGISTRATION NUMBER 258

ADDRESS [illegible]

REMARKS: [illegible] 3-9-64

2.3 06

MAR 24 1964

Provided it bears the [illegible] of the District of Columbia Department of Public Health and shows no evidence of [illegible] alterations, it is certified that the above is a true and correct reproduction of the original certificate filed in the Vital Statistics Section of that Department.

[signature]

[illegible] Sincoli

Chief, Vital Statistics Section

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTIRCT OF COLUMBIA CIRCUIT

No. 23,932

BETTY JOE BOWMAN,
Executrix of the Estate of
James L. Bowman, Deceased,
Appellant,

v.

REDDING AND CO., INC., and
ANTHONY IZZO AND CO., INC.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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Of Counsel:
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Washington, D. C. · THIEL PRESS 202 393-0625

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ANTHONY IZZO AND CO., INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

ISSUES PRESENTED*

1(a). Did the trial court err in ruling that there was insufficient evidence for the jury to find that the violation by the general contractor Redding and Company, Inc., of the District of Columbia Industrial Safety Regulation requiring a bolted or hinged bar across the opening in the

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* This case has not previously been before this Court.

building leading to the hoist was the proximate cause of Bowman's death?

1(b). Did the trial court err in ruling that there was insufficient evidence for the jury to find that the violation by the general contractor Redding and Company, Inc., of the District of Columbia Industrial Safety Regulation requiring a copy of the signal code for the hoist to be conspicuously posted on all floors was the proximate cause of Bowman's death?

2. Did the trial court err in holding that the decedent James L. Bowman was contributorily negligent as a matter of law?

3. Assuming *arguendo* that decedent was contributorily negligent, did the trial court err in refusing to submit the question to the jury as to whether the general contractor Redding and Company, Inc., had the last clear chance to prevent the death of Bowman?

4. Did the trial court err in finding that there was no evidence that any negligence of the masonry subcontractor, Anthony Izzo Company, Inc., was the proximate cause of Bowman's death?

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is based upon the Act of October 31, 1951, 65 Stat. 726, as amended, 28 U.S. Code, Sec. 1291.

REFERENCES TO RULINGS

The ruling of the trial court setting forth the basis for granting the appellees' motions for a directed verdict and for entering judgments in accordance therewith was rendered on November 17, 1969, and is found at pages 73-78 of the appendix.

STATEMENT OF THE CASE

This is an action brought by appellant, Betty Joe Bowman, administratrix of the estate of her husband, James L. Bowman, deceased, for his wrongful death allegedly caused by the negligence of the general contractor Redding & Company, Inc., and two subcontractors, Anthony Izzo Company, Inc., and Williams Enterprises, Inc. There was a jury trial in the court below and at the conclusion of the plaintiff's case as to liability, the three defendants moved for a directed verdict in their favor. The motions were granted by the trial court and judgments were entered in favor of all three defendants. This is an appeal from the judgments entered in favor of two of the defendants, namely, Redding & Company, Inc., the general contractor and Anthony Izzo Co., Inc., the masonry subcontractor.

STATEMENT OF POINTS

1. There was sufficient evidence introduced by appellant to find that the violations by the general contractor Redding and Co., Inc. of the District of Columbia Industrial Safety Regulations were the proximate cause of James L. Bowman's death.

2. Bowman was not contributorily negligent as a matter of law.

3. There was sufficient evidence before the jury to show that the general contractor Redding and Co., Inc. had the last clear chance to prevent the death of Bowman and the case should have been submitted to the jury with appropriate instructions on the "last clear chance" doctrine.

4. There was sufficient evidence before the jury to show that the negligence of Leonard Williams, an employee of the masonry subcontractor, Anthony Izzo Co., Inc., was the proximate cause of James L. Bowman's death.

STATEMENT OF FACTS

The appellant, Betty Joe Bowman, (Betty Joe Dennis at the time of the trial), is the duly qualified administratrix of the estate of her late husband, James L. Bowman. Mr. Bowman was survived by his widow, two minor children, ages 2 and 1, a posthumously born child, and two minor stepchildren, ages 10 and 5, all of whom he supported.

On the day of his death, March 9, 1964, Mr. Bowman was employed as an apprentice window caulker by Mr. Harold Vinge, who was doing business under the trade name of Vinge Company. Mr. Bowman had worked for the Vinge Co. for 18 months and was a well qualified workman and had worked by himself on various jobs. (App. 4)

About 7:30 a.m. on the 9th of March, 1964, Mr. Bowman met Mr. Ernst Tonstad (a caulking mechanic under whom he worked), at 17th and Eye Streets, N.W., Washington, D. C. and was directed to proceed to a construction job at 1025 Vermont Avenue, Washington, D. C. and to go to the 12th floor to work on the windows that had not been caulked. Mr. Tonstad said he would return to the company shop in Alexandria and pick up more caulking material and meet Mr. Bowman on the 12th floor. (App. 5-6).

Mr. Bowman reached the building at 1025 Vermont Avenue, N.W., Washington, D.C. about 8:00 a.m. Some time later he was observed on the 11th floor by Mr. Marginot, a sheet metal worker, who was working on a scaffold that was constructed in front of an opening in the building that was used to bring in building materials from a hoist or elevator that was located on the outside of the building (App. 33). The hoist or elevator was about three feet from the rear wall of the building and reached by a wooden ramp that extended from about six feet inside the building over the sill of the opening to within eight inches of the hoist. (App. 67). It was over this ramp inside the building that the scaffold had been constructed on which Mr. Marginot was working when he saw Mr. Bowman that morning. The scaffold completely obstructed the opening

in the wall and extended to within a foot of the wall and the opening. (App. 33) Mr Marginot observed Mr. Bowman squeeze between the scaffold and the wall and lean out of the opening over the ramp to observe, from the outside, the windows and the caulking that had been done on this floor (App. 33, 44). The windows had all been caulked on this floor but not on the floor above. After examining the windows from the outside he squeezed by the scaffold again and disappeared inside the building.

Shortly after this Mr. Bowman was struck by a descending hoist at the 12th floor level and was observed pinned between the ramp and the floor of the hoist by Mr. Williams, an employee of Anthony Izzo Co., Inc., the brick subcontractor. Mr. Williams was loading the hoist at ground level with bricks and mortar for use of bricklayers working of the roof and penthouse immediately above the 12th floor level. Mr. Robert L. Humphrey, an employee of the general contractor, Redding & Co., Inc., was operating the hoist from a shed on the ground, lifting bricks and mortar to the Anthony Izzo bricklayers on the roof pursuant to signals given by the bricklayers on the roof and Mr. Williams on the ground. Just prior to Mr. Bowman's mishap a signal had been given to Mr. Humphrey to bring the hoist down to ground level (App. 55). This signal was transmitted by the ringing of a bell in the operator's shed by the workmen on the roof. The bell was loud and could be heard throughout the building and was rung three times in accordance with the bell code used at this construction site (App. 56).

At the time of the accident Mr. Williams saw Mr. Bowman pinned between the floor of the hoist and the ramp on the 12th floor level. His face was toward the building with the floor of the elevator pressing against his back and the edge of the ramp pressing against his chest (E.00). His legs were dangling below the hoist in the shaft and his head, shoulders and arms were above the ramp and the floor of the elevator. (App. 57-58)

Williams then ordered the hoist operator, who had no view of the hoist or shaft, to "hold it". Humphrey testified Williams also ordered him to raise the elevator and that he did so, unpinned Bowman, who dropped to the ground and was killed. (App. 23-24) Mr. Williams, at the trial denied he ordered the hoist raised but he had signed a statement at the time admitting he had done so, which statement was considered by the trial judge. (App. 71-73)

At the time of this occurrence, there was in force and effect certain building safety regulations having the force of law. Enforcement of these regulations was delegated to a branch of the District Government known as the D. C. Government Minimum Wage and Industrial Safety Board (App. 14). The supervisor charged with the duty of enforcing the regulations was Clyde W. Farrar, Jr. He also had the duty to investigate industrial accidents and prior to investigating this accident had investigated 350-450 accidents (App. 15). He qualified as an expert in this field (App. 16).

He testified that the accident had occurred at 9:07 a.m. and he had received notice at 9:19 a.m. on March 9, 1964. He left his office at 9:25 and went directly to the site. (App. 16) There he met Police from the Homicide Division and proceeded to the 12th floor. (App. 17)

His investigation disclosed that there was no "door, gate, or hinged bar" across the opening in the building on the twelfth floor and there was no signal system for the hoist posted on the twelfth floor. The parties, during the trial, entered into a stipulation that there was in force and effect at the time of the occurrence a regulation issued by the District of Columbia Industrial Safety Board which read as follows:

> "D-11-21105. Each entrance to a shaft shall be provided with a substantial door, gate, or hinged bar. If a hinged or bolted bar is used, it shall be at least 18 inches from the line of travel of the extreme edge of the car or cage, and 36 inches above the platform level." (App. 17)

The parties also stipulated that there was in force and effect at the time of the occurrence a regulation issued by the District of Columbia Industrial Safety Board which read as follows:

> "C-11-21106 (c) Safe practices. (1) An effective, uniform signal system shall be used to signal operator and a conspicuous copy of such signal system shall be posted at each work level and at the operator's station." (App. 18)

That there was no gate, door, hinged or bolted bar across the opening from the building to the hoist on the 12th floor at the time of the accident and later investigation was supported by the testimony of the sheet metal worker, Mr. Marginot, who had been working on the scaffold on the 11th floor in front of the opening in the building and had seen Mr. Bowman falling down the shaft and had accompanied the safety inspectors to the 12th floor at the time of the investigation. He testified that there were no safety bars at all and there was no bell signal code posted on this floor (App. 35). Leonard Williams, who was an employee of Anthony Izzo & Co., Inc., the masonry subcontractor, was called by plaintiff to testify about seeing Bowman just before he fell and his direction to the hoist operator. He stated on cross-examination, over plaintiff's objections as not being within the scope of his direct testimony, that the bars were all in place on all floors and that he could see them from the ground but admitted that he had not been up in the building either before or after the accident (App. 76).

There was testimony by Mr. Tonstad that the window caulkers did not use the hoist to obtain their materials for caulking but that their materials were hand carried and that so far as he knew there was no reason for the caulkers to be near the hoist. (App. 12) He testified that the caulking of each window was done from the inside by leaning out the window and applying the material between the window frame and the brick work, that all the glass had been installed in the windows on the 12th floor and that when the glass was in place it was more difficult to caulk or to see

the caulking for each window had to be opened by a key before the caulker could caulk through the opening (App. 10-12)

As further evidence of how the accident had occurred, plaintiff sought to introduce Mr. Bowman's death certificate and autopsy report to support the contention that at the time he was struck by the hoist he was bending over facing the building to observe the outside of the windows to be caulked and was hit on his back by the hoist while in that position and knocked off the platform and pinned as the witness described and released, fell to the ground to his death. The court refused to admit either the death certificate or autopsy report (App. 77).

Thereafter, the court granted the motions of all defendants for a directed verdict and entered an order dismissing the case. From this order and the granting of the directed verdict plaintiff has perfected this appeal against two of the defendants, Anthony Izzo Co., Inc. and Redding & Co., Inc.

I

THE LOWER COURT ERRED IN FINDING THAT THERE WAS NO EVIDENCE TO ESTABLISH THAT THE VIOLATION OF THE INDUSTRIAL SAFETY REGULATIONS BY APPELLEE REDDING WERE THE PROXIMATE CAUSE OF BOWMAN'S DEATH

In ruling on appellee's motion for a directed verdict, the trial court found that there was sufficient evidence that appellee Redding & Co., Inc., had violated two industrial safety regulations, one requiring a bolted or hinged bar across the opening in the building leading to the hoist, the other requiring a copy of the signal code for the hoist to be conspicuously posted on all floors and that the jury could reasonably find that the violation of these regulations constituted negligence on the part of the appellee Redding. The trial court, however, went on to find that there was no evidence that these violations of the regulations were the proximate cause of Bowman's death and that the jury could

only speculate and conjecture on the question of causation. Accordingly, the trial court granted appellee's motion for a directed verdict.

Appellant's position is that there was ample evidence to show that the violation of the regulations by appellee Redding & Co., Inc., was the proximate cause of Bowman's death and that the trial judge should have denied the motion for a directed verdict.

It is well settled that a trial court in ruling on a motion for a directed verdict must resolve all conflicts in evidence against the moving party and from the facts as found must draw the inferences most favorable to the moving party's opponent. Only when the probative facts are undisputed and when reasonable minds can draw but one inference from them does the question become one of law for the court. *Aylor v. Intercounty Construction Corp.*, 127 U.S. App. D.C. 151, 381 F.2d 930 (1967).

In the case on appeal, the injury which occurred, Bowman's death, was the very kind of injury which the District of Columbia Industrial Safety Regulations were intended to prevent. The regulations in general were obviously intended to promote the safety of workmen on the construction site. The plain and obvious purpose of the safety regulation requiring a hinged bar across the opening in the building leading to the hoist was to warn construction workers not to go out onto the ramp, and if they did, to exercise extra care. If the bar had been in place, a reasonable man could well infer that Bowman would have heeded the warning and not gone out onto the ramp, or that if he had, he would have been more careful and the accident would not have happened. It could be reasonably inferred that the absence of the bar led Bowman to believe that anyone could use the ramp for any purpose and that the ramp was safe. Thus, the causal connection between the violation of the regulation and the accident should be apparent.

This court has defined proximate cause as "that cause which in natural and continual sequence, unbroken by any

efficient intervening cause, produces the injury, and without which the result would not have occurred." *Dunn v. March*, 129 U.S. App. D.C. 245, 393 F.2d 354 (1967). It does not need to be the sole cause but may be a contributing cause, *Danzansky v. Zimbolist*, 70 App. D.C. 234, 105 F.2d 457 (1939), and it should be a material element and a substantial factor in bringing about the result. Prosser, *Law of Torts* (3rd ed., 1964), pp. 241-245; Restatement, Torts 2d., Secs. 431-433 (1965). "If the injury complained of is a natural and probable consequence of a violation of the statute, then the violation is correctly taken as the proximate cause of the injury. If the very injury has happened which was intended to be prevented by the statute law, that injury must be considered as directly caused by the nonobservance of the law" 38 Am. Jur., *Negligence* Sec. 166, P. 838. It is clear that the evidence as to causation in this case amply meets these tests.

The causal connection between the violation of the regulation requiring the posting of the signal code for the hoist and the accident is equally apparent. The purpose of this regulation was not only to give workmen information about how to signal for the hoist but was also to give them notice as to the location and movement of the hoist. If the general contractor had complied with this regulation, decedent would have had a further warning when he heard the bell and could have taken steps for his own protection and avoided the rapidly descending hoist.

The essential elements in this case are very similar to those in *Ross v. Hartman*, 78 U.S. App. D.C. 217, 139 F.2d 14 (1943); *cert. den.* 321 U.S. 790 (1944), where this court held that the negligence of the defendant in violating a safety ordinance was the proximate cause of plaintiff's injuries as a matter of law. The defendant's agent violated a D. C. traffic ordinance by leaving defendant's truck unattended with the ignition unlocked and the keys in the switch, and unknown persons drove the truck away and then negligently ran over plaintiff. This court found that

the purpose of the ordinance was to promote the safety of the public in the streets, that the defendant's violation of the ordinance was negligence per se and that where the violation of the safety regulation in fact brings about the harm which the safety regulation was intended to prevent, then the violation of the regulation is the proximate or legal cause of the harm as a matter of law. "This comes only to saying that in such circumstances the law has no reason to ignore the causal relation which obviously exists in fact. The law has excellent reason to recognize it since it is the very relation which the makers of the ordinance anticipated." 78 U.S. App. D.C. at 218. The court held that both negligence and causation had been too clearly established for submission to the jury, and that the intervening act of the wrong-doer was immaterial.

Janof v. Newsom, 60 App. D.C. 293, 53 F.2d 151 (1931), is to the same effect and holds that where the very injury has occurred which the safety ordinance was intended to prevent, then the violation of the statute is the proximate cause of the injury. Both *Ross v. Hartman* and *Janof v. Newsom* have been approved by this court in the later case of *Kendall v. Gore Properties*, 98 App. D.C. 378, 236 F.2d 673 (1956). ~~Pg 13~~

In *Ross v. Hartman*, the causal relation was so obvious that this court held that there was proximate cause as a matter of law. With this in mind, the trial judge should at least have seen that there was sufficient evidence of proximate cause to have denied the motion for a directed verdict, especially since *Ross v. Hartman* involved the problem of the intervening wrong-doer breaking the chain of causation, while there is no such problem in the pending case.

There is even some suggestion in *Ross v Hartman* and *Janof v Newsom* that the amount of evidence relating to proximate cause in cases involving a violation of safety ordinances and regulations may be substantially less than the amount of evidence required in other cases. That is to say, there is no discussion in these cases that the evidence must

measure up to either the "but for" rule of causation or the substantial factor formula, and this court seems to be saying that if there is any causal connection at all in fact between the violation of the ordinance and the injury, then legal or proximate cause has been established possibly as a matter of law but certainly sufficiently for submission to the jury and, therefore, for denial of a motion for a directed verdict.

This court has repeatedly said that proximate cause is a question of fact which is for the jury to decide unless the evidence is so clear that reasonable minds could not differ.

In *Richardson v Gregory*, 108 U.S. App. D.C. 263, 281 F.2d 626 (1960), this court said that whether or not the violation of a regulation is the proximate cause of the injury is a question to be decided by the jury. In *District of Columbia v Nordstrom*, 117 U.S. App. D.C. 165, 327 F.2d 863 (1963), the trial court instructed the jury that the violation of a traffic regulation was the proximate cause of the injury and this court reversed on the grounds that it was for the jury to decide whether the violation of the regulation was the proximate cause of plaintiff's fall. In *Karlow v. Fitzgerald*, 110 U.S. App. D.C. 9, 288 F.2d 411 (1961) where the plaintiff was one of those for whose benefit the regulation was issued and where one of the purposes of the regulation was to eliminate the risk of the kind of injury which actually occurred, this court said that the trial judge was correct in telling the jury that they could find that proximate cause existed. In *Whetzel v Jess Fisher Management Corporation*, 108 U.S. App. D.C. 385, 282 F.2d 943 (1960), this court said that in a case involving the violation of safety regulations, the question of proximate cause should be submitted to the jury.

Thus, it would appear that there was not only sufficient evidence of proximate cause to cause reasonable minds to differ but possibly to establish proximate cause as a matter of law. In either case, the motion for a directed verdict should have been denied.

II

THE TRIAL COURT ERRED IN FINDING THAT BOWMAN WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW

The question of contributory negligence should be submitted to the jury unless the facts and the inferences to be drawn therefrom are so clear that reasonable men could not differ. *Kanelos v. Kettler*, 132 U.S. App. D.C. 133, 406 F.2d 951 (1968); *Whetzel v. Jess Fisher Management Corp., supra.* In this case the trial court was of the opinion that Bowman was negligent as a matter of law because Bowman went from inside the building out onto the ramp where he came into contact with the moving hoist cage and because there was no showing that he had to use the ramp in connection with his work. There was sufficient evidence from which the jury could reasonably infer that Bowman went out onto the ramp in connection with his work.

The jury might reasonably infer that he went out onto the ramp to examine the outside of the windows to see whether they had been caulked and if so, how they had been caulked. Mr. Marginot testified that he had done this just previously on the eleventh floor although he had not actually gone out onto the ramp but ad only leaned out through the opening of the building. The jury, however, might infer that he had decided to go out onto the ramp on the twelfth floor in order to get a better look and that this was in line with his employment.

There was evidence that Bowman had no need to use the hoist in connection with his work since his materials could be carried by hand without incurring any charge for using the hoist. There was no evidence, however, that he was forbidden to use the ramp in connection with his work or that its use was restricted to special activities or workers with special qualifications.

The trial court relied on *Neff v. United States of America*, ___U.S. App. D.C.___,___F.2d___(No. 22, 262, decided October 10, 1969), in reaching its decision that Bowman

was contributorily negligent as a matter of law, but the instant case is clearly distinguishable from *Neff*. This court held in *Neff* that the plaintiff was contributorily negligent in intentionally exposing himself to a substantial risk which was or should have been obvious to him. In the pending case, Bowman had no reason to think that the ramp was unsafe and did not have any warning not to use the ramp and therefore did not intentionally expose himself to danger. This case is more like *Hewitt v. Safeway Stores, Inc.*, 131 U.S. App. D.C. 270, 404 F.2d 1247 (1968), where this court, although applying Maryland law, said that if plaintiff can prove unsafe working conditions, the defense of assumption of risk and presumably contributory negligence is barred as a matter of law. And see *Kanelos v. Kettler, supra*. Since reasonable men could differ on the inferences to be drawn from the evidence, it was error for the trial court to find that Bowman was contributorily negligent as a matter of law and accordingly appellant is entitled to a new trial.

ARGUMENT III

A. Assuming, Arguendo, that decedent was contributorily negligent, the trial court erred in refusing to apply the last clear chance doctrine to the appellee, Redding & Co., Inc.

The facts of this case show that on the morning of the accident, the hoist was being operated by Mr. Robert L. Humphrey who was employed by the appellee, Redding & Co., Inc., the general contractor. The brick layers employed by appellee Anthony Izzo Co., Inc., were working on the roof of the building and the brick and mortar was being loaded on the hoist platform by Mr. Williams who was a laborer working for the Anthony Izzo Co., Inc.
Mr. Humphrey took his directions in operating the hoist from Leonard Williams on the ground and the brick layers working on the roof.

The decedent was pinned by the hoist on the twelfth floor ramp of the building as the hoist was coming down from the roof. The decedent's chest was on the ramp and his legs dangling dowaward in the shaft of the hoist. The decedent was pinned briefly between the ramp and the cage. Thereafter, Mr. Humphrey, at the direction of Mr. Williams, reversed the hoist and raised the cage approximately two feet whereupon the decedent fell down the shaft twelve floors to his death. Mr. Williams had seen the decedent pinned by the hoist and, according to Mr. Humphrey, he hollered to Mr. Humphrey to stop the hoist and then he told him to raise the hoist. Mr. Williams denied that he told Humphrey to raise the hoist.

Based on the above facts, appellant contends that the last clear chance doctrine was applicable and that the question of whether or not the appellee, Redding & Co., Inc., could have avoided the death of the decedent by the use of reasonable care was for the jury.

The last clear chance doctrine has its origin in the leading English case of *Davies v Mann*, 10 M. and W. 546, 152 Eng. Rep. 588 (1842). In the District of Columbia, the leading case on the last clear chance doctrine is *Dean v Century Motors, Inc.*, 81 U.S. App. D.C. 9, 1954 F.2d 201 (1946) where Judge (now Senior Circuit Judge) Miller said for this Court, at 154 F.2d at page 202:

> The doctrine presupposes a perilous situation created or existing through the negligence of both the plaintiff and defendant, but assumes that there was a time after such negligence had occured when the defendant could, and the plaintiff could not, by the use of means available, avoid the accident. It is not applicable if the emergency is so sudden that there is no time to avoid the collision, for the defendant is not required to act instantaneously.

Since the *Dean* case, the last clear chance doctrine has been applied in an unbroken line of cases in the District of Columbia. *Conlon v Tennant*, 110 U.S. App. D.C. 140, 289

F.2d 881 (1961); *Richardson v Gregory*, 108 U.S. App. D.C. 263, 281 F.2d 626 (1960); *Gay v Auger*, 97 U.S. App. D.C. 336, 231 F.2d 495 (1956); *Reid v Lyon*, 278 F. Supp. 855 (D.D.C. 1967); *Fleming v Ayoud*, 206 F. Supp. 860 (D.D.C. 1962). Furthermore, as the Court in *Gay v Auger*, *supra*, points out, the duty of the defendant under the last clear chance doctrine arises subsequent to what is called his "initial" or "primary" negligence, and is not connected with it. "The last clear chance is a chance that arises after the peril has developed." 97 U.S. App. D.C. at p. 337.

The instant case presents the clearest example of when the last clear chance doctrine applies. For as is stated in Harper and James, *Law of Torts*, Sec. 22.13 (Vol. 2, 1956), page 245:

> The last clear chance doctrine has been applied in the United States to cases which fit into one of the four following catagories:
>
> 1. Where plaintiff is in peril and unable to get out of it by the exercise of reasonable care, and defendant knows plaintiff's position and either realizes or has reason to realize the danger to plaintiff and thereafter could have avoided the injury by the use of reasonable care...

As Harper and James point out at page 1246 in the above cited text, all courts apply the last clear chance doctrine to permit recovery in the situation outlined above. And see Restatement of Torts 2d, Sec. 479(b)(i) and (ii)(1965); Prosser, *Torts*, Sec. 52 (2d. Ed. (Hornbook Series) 1955).

In the instant case we have a classic example of a factual situation in which the last clear chance doctrine should have been submitted to the jury for its consideration. Assuming the Court was correct in finding that decedent was contributorily negligent, it is apparent from the facts that this case should have been submitted to the jury with appropriate instructions on the last clear chance doctrine for the jury's determination of whether or not the appellee, Redding & Co., Inc., was negligent because its employee, Humphrey,

raised the hoist which caused the decedent to fall to his death. The uncontradicted facts raise the question whether Humphrey exercised due care under the circumstances. A reasonable man might conclude that the hoist operator should not have raised the hoist without first investigating and having someone hold onto Bowman so that he would not fall. Accordingly the Court erred in failing to allow the case to go to the jury for its determination of whether or not the general contractor, Redding & Co., Inc., could have avoided the accident by the use of reasonable care.

Appellee, Redding & Co., Inc., will undoubtedly argue that the last clear chance doctrine was not before the Court since appellant failed to specifically raise this issue in his pretrial statement. However, from a fair reading of appellant's pretrial statement and the pretrial order, it is clear that appellee was put on notice that appellant was relying on the last clear chance doctrine. Appellant in its pretrial statement alleged that the appellee, Redding & Co., Inc., was negligent in the operation of the hoist through Robert L. Humphrey, hoist operator and employee of Redding & Co., Inc. (App. 1). The pretrial order filed in the instant case specifically states that the appellant contended that the death of the decedent and appellant's resulting damages were caused by the negligent operation of the hoist by Robert L. Humphrey, hoist operator and employee of Redding & Co., Inc. (App. 1).

Although the appellant's pretrial statement did not use the precise words "last clear chance", it clearly raised the issue "with sufficient certainty and clarity to apprise the trial Court and the opposing defendant of what they may expect in the course of the trial." *Johnson v Geffen*, 111 U.S. App. D.C. 1, 294 F.2d 197 (1961), *Conlan v Tennant, supra.* Furthermore, on a motion for directed verdict, the plaintiff's pretrial statement must be read in the light most favorable to plaintiff. *Johnson v Geffen, supra.* Since it is clear from the facts of the case and from appellant's pretrial statement and the pretrial order that appellant relied

on the last clear chance doctrine as a basis for recovery at the trial of the instant case, it can hardly be argued that the issue was not before the trial Court on its ruling on the appellee Redding & Co., Inc.'s motion for a directed verdict. Therefore, the trial Court erred in failing to allow the case to go to the jury with appropriate instructions concerning the last clear chance doctrine.

ARGUMENT IV

THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT HAD FAILED TO PROVE THAT ANY ACT BY APPELLEE ANTHONY IZZO CO., INC. WAS A PROXIMATE CAUSE OF THE INJURY TO THE DECEDENT RESULTING IN HIS DEATH.

The facts of this case show that when the decedent was pinned by the hoist on the twelfth floor ramp, the hoist stopped. At that time, Mr. Williams, a laborer working for the Anthony Izzo Co., Inc., looked up and saw the decedent pinned by the hoist and saw his legs dangling downward in the shaft of the hoist. There is evidence before the jury that Mr. Williams yelled to the hoist operator, Mr. Humphrey, to stop the hoist and then told him to raise the hoist because a man was pinned. Mr. Humphrey testified that he reversed the hoist and raised the cage approximately two feet whereupon the decedent fell down the shaft twelve floors and died and that he raised the hoist at the direction of Mr. Williams. Mr. Williams admitted telling Mr. Humphrey to stop the hoist, but he denied telling Humphrey to raise the hoist because a man was pinned. Based on these facts, the trial Court found that there was no showing that any act of Anthony Izzo Co., Inc.'s employee was a proximate cause of the injury to the decedent resulting in his death. In ruling on a motion for directed verdict, the Court must resolve all factual disputes against the moving party. Appellant respectfully submits that had the case been submitted to a jury, the jury could have found that Williams, Anthony Izzo Co.,

Inc.'s employee, in signaling Humphrey to raise the cage, was negligent and that the decedent died of injuries incurred by the fall after being released from the pinning.

The trial Court held that there was no evidence on which a jury could possibly find whether the decedent died from injuries received by the pinning, or whether he died from injuries incurred by the fall after being released from the pinning. In making this ruling, the trial Court overlooked the well-established presumption of the continuance of life. "One who is shown to be alive at a given time is presumed to remain alive until the contrary is shown by proof, or, in the absence of proof, until a different presumption arises". 25A C.J.S., *Death*, Sec. 5, p. 547; *Jones on Evidence*, Sec. 68 (Vol. 1, 1958) p. 122; *Krell v Maryland Dry Dock Co.*, 41 A.2d 502 (Md. 1945). In other words, appellant contends that she did not have the burden of proof as to the issue of establishing the time at which death occurred, but that the appellee, Anthony Izzo Co., Inc., had the burden of proving that the decedent died by the pinning rather than by his fall of twelve floors to the ground.

If the decedent was alive after he was pinned by the hoist, then there was evidence before the jury upon which it could base a finding that the act of Williams in directing Humphrey to raise the hoist was a negligent act which caused the decedent to become unpinned and to fall to his death. On these facts, the negligent act of Williams in signaling Humphrey to raise the hoist would be the proximate cause of the death of the decedent.

The Court refused to receive into evidence the autopsy report and death certificate of the decedent. The autopsy report shows that the decedent received no fractures or injuries to his neck or to his head, and appellee submits that this is additional evidence that the decedent died from the fall and the resulting impact rather than from pinning by the hoist. The uncontradicted evidence showed that the deceased was pinned by the hoist near his ribs and there was no showing by the appellee Anthony Izzo Co.,

Inc., that the deceased died as a result of the pinning. Appellant contends that the trial court erred in failing to allow the autopsy report and death certificate of the decedent to be admitted into evidence as these documents were probative in determining the types of injuries received by the decedent, and the causes of his death.

Based on all the evidence before the trial court and taking into account the presumption of continuing life, it is abundantly clear that there was ample evidence to allow the case to go to the jury on the question of whether or not the Anthony Izzo Co., Inc., was negligent by the act of its employee, Williams, in directing Humphrey to raise the hoist, which caused the decedent to become unpinned and to fall to his death. Since there was evidence of primary negligence on the part of appellee Anthony Izzo Co., Inc., and since there was no proof that the deceased died from the pinning as opposed to the fall, the court erred in granting the motion for a directed verdict filed by Anthony Izzo Co., Inc.

CONCLUSION

For the foregoing reasons, the judgments below in favor of Redding & Co., Inc., and Anthony Izzo Co., Inc., should be reversed and appellant should be granted a new trial.

Respectfully submitted,

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Attorneys for Plaintiff

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,932

BETTY J. BOWMAN,
Executrix of the Estate of
James L. Bowman, Deceased,

Appellant,

v.

REDDING AND CO., INC., and
ANTHONY IZZO CO., INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE REDDING AND CO., INC.

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BRIEF OF APPELLEE REDDING AND CO., INC.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In the opinion of appellee Redding and Co., Inc., the following issues are presented for review as to this appellee:

1. Whether the District Court erred in ruling that there was no evidence from which the jury could find that any

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*We have used the word Executrix in the caption because that is the word used in the caption by appellant. The record indicates that Mrs. Bowman is Administratrix. (App. 3)

negligence by this appellee was a proximate cause of the death of appellant's decedent, James L. Bowman (hereinafter referred to as Bowman).

2. Whether, if the District Court erred in ruling that plaintiff failed to prove that negligence by appellee was the proximate cause of Bowman's death, the District Court also erred in ruling that from appellant's own evidence, Bowman was contributorily negligent as a matter of law, and appellee Redding and Co., Inc., did not have the last clear chance to prevent the accident.

STATEMENT OF THE CASE

Nature of the case, course of proceedings, and its disposition in the court below

This appellee accepts the statement of these matters contained in appellant's brief.

Statement of the facts relevant to the issues presented for review

This appellee believes that the following statement of facts will be useful in supplementing the statement presented by appellant.

At the outset, when Bowman was directed, at 8:00 or 8:30 A.M. (App. 8), by his foreman, Ernst Tonstad, to proceed from 17th and Eye Streets, N.W., to the 1025 Vermont Avenue construction site, he did not have the necessary materials, caulking material and ochre (used for backstop before caulking compound can be applied), which were required by him to begin work and, therefore, there was no work which Bowman could have been doing at the time he fell to his death (App. 9). There was no ochre available on the job (App. 9). Tonstad's instruction to Bowman was to wait for him on the job (App. 8). Tonstad was going to work with Bowman that day (App. 12).

Tonstad went back to the shop in Alexandria, Virginia, to pick up material (App. 6), and reached the shop either after or just before word arrived there about Bowman's accident (App. 8, 9). The trip took Tonstad about one-half hour to three-quarters of an hour (App. 9). In the meantime, Bowman had gone to the 1025 Vermont Avenue job from 17th and Eye Streets, N.W., and had made a stop on the eleventh floor (App. 43-44). There is no evidence of the precise time Bowman reached the building, nor of the route followed by Bowman to get to the job or within the building, except for the visit to the eleventh floor.

The windows on the twelfth floor, as well as throughout the building, were pivot windows (App. 11). A pivot window "either shrinks in the middle or comes straight down from the top" (App. 11). The windows required keys to open (App. 11). The caulking work on these windows would be done while the workman was standing on the floor of the building on the inside of the building, by just reaching out and applying the caulking material on the window's outside edge (App. 12). It was the policy of the Vinge Co., Bowman's employer, to carry tools and caulking materials up the stairs and not to use the hoist (App. 12). Tonstad made this policy known to the employees he supervised, among whom was Bowman (App. 12). Tonstad had never on any occasion on behalf of the Vinge Co. asked for permission or otherwise used the hoist on that job (App. 12).

Tonstad also characterized Bowman as a qualified apprentice caulker (App. 4). He testified that the job of a window caulker does not involve any danger (App. 7).

The hoist in this case had been present on the job during the whole time the Vinge Co. had worked on the job (App. 12). It was what is commonly known in the trade as an American Tubular Standard Hoist with a double drum, consisting of two elevators which went up and down separately (App. 27, 48). Platforms or ramps lead out from the building to the hoist (App. 13, 32, 44), a distance of about

three feet (App. 65). The caulking on the part of the building where the hoist was would be done after the hoist was down (App. 13). There was no reason for any employee of Vinge Co. to be near the hoist (App. 12).

The only other evidence of Bowman's whereabouts from the time he left the corner of 17th and Eye Streets, N.W., until he fell from the building (other than Marginot's observation of him on the eleventh floor when he got around Marginot's scaffold and looked out of the building (App. 33)) came from Leonard Williams, the only eye witness to any part of the actual occurrence. Williams was also the only witness who saw the area of the wall at the entrance to the hoist on the twelfth floor at the time of the occurrence. Williams had been loading the hoist on the ground (App. 47-48). He looked up and saw the hoist coming down (App. 55). When it got to about the eleventh floor, he saw Bowman hanging (App. 55). He saw the lower part of Bowman's body, facing back toward the building (App. 55-56). Bowman was "coming down with the cage" (App. 56). Just before Bowman was observed, the hoist cage had been up on the roof (App. 29).

There was no evidence that, as stated in appellant's brief at page 5, "Bowman was struck by a descending hoist at the 12th floor level." Nor did Williams testify, as stated in appellant's brief on the same page, that he observed Bowman "pinned between the ramp and the floor of the hoist," or that he saw Bowman "pinned between the floor of the hoist and the ramp on the 12th floor level."

The witness William Marginot, who was working on the eleventh floor and had seen Bowman on that floor earlier, saw Bowman fall less than six feet away, "going by the elevator hoist outside the elevator shaft that the bricklayers use" (App. 33). The cage was above Marginot at the time (App. 36).

The witness Clyde W. Farrar, Jr., of the D.C. Government Minimum Wage and Industrial Safety Board, testified that he received a report that the accident occurred at 9:07

A.M., that he was assigned to investigate it at 9:25 A.M., and that he then went to the scene (App. 16), arriving there at about 10:15 A.M. It was stipulated between counsel for appellant and counsel for Redding and Co. that Farrar would testify that when he observed the twelfth floor, there was no door, no gate, or hinge or bolted bar (App. 17), and that there was no conspicuous copy of a signal system posted on that floor at the time of his arrival on the scene (App. 17).

The witness Williams testified as follows:

> (App. 63) Q. When you looked up, Mr. Williams, at the hole of the entrance in the building where this man was with the cage, did you see the safety bar across that building? A. It was across there.
>
> Q. And across there you mean running straight across? A. At that entrance. I see the two sides when you are standing where I am standing you can see the floor and that bar was down.
>
> Q. When you mean the bar was down—[1062] A. It was fastened.
>
> Q. And you could see that clearly from where you were on the ground? A. Yes.
>
> * * *
>
> (App. 67) Q. You never went up and examined the bars or whatever you say was across the opening? A. I stayed on the ground. But I can stand up on the ground and look up and see they were fastened.
>
> * * *
>
> (App. 68) Q. As you look up from that position where are these ramps that hung from the building floors out to the hoist, are they up above your head? A. They are all up at each floor.
>
> Q. Now standing there how many of the openings can you see? Are not the ramps in your way of looking up? A. I can see every one of them.
>
> * * *

(App. 68) Q. Were you paying any particular attention to the openings and how they were safeguarded? A. I could see the bars across.

[1070] Q. Were you paying any particular attention, was that part of your job to? A. Every time I turn around I am looking up there to see how everything is.

Q. You looked up there every time you come around there? A. Standing there, so I can look up there.

Q. Was it part of your duty or part of your job? A. That is part of my duty right there to see it on the ground, to look up and see those bars there."

The hoist, the bell system and the operator's shed conformed to custom and practice in the industry (App. 27). The bell system was used to instruct the hoist operator whether to raise or lower the hoist (App. 28). The bell was described by Mr. Humphrey as "a real good sized bell which was something like nine inches in diameter: and usually we work with a much smaller bell and still get the signals" (App. 28). The bell could be heard quite a distance, "clean out to L Street" from where it was in the shed (App. 28).

Other facts not set forth in appellant's statement are contained in the brief of appellee Anthony Izzo Co., Inc., and are not repeated here.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY RULED THAT THERE WAS NO EVIDENCE FROM WHICH THE JURY COULD FIND THAT ANY NEGLIGENCE BY REDDING AND CO. WAS A PROXIMATE CAUSE OF BOWMAN'S DEATH.

The District Court granted appellee Redding and Co.'s motion for directed verdict on three grounds, as follows:

> "The court is constrained to grant defendant Redding's motion for directed verdict on three grounds: (1) There is no evidence showing the defendant Redding violated any duty owing to the decedent under the existing circumstances as to the area where he came in contact with the cage of the hoist. His work did not require that he leave [1119] the building, nor was any person permitted to ride hoist, nor did decedent or his employer obtain their materials by hoist or the platform in question, nor was decedent required to travel the area in question, in coming to or leaving his place of work. (2) Assuming sufficient evidence as to violation of the two safety regulations, there is no evidence on which jury could without speculation or conjecture find such violation or violations to have been a proximate cause of the decedent's death. (3) Under all the facts and circumstances in evidence, decedent was contributorily negligent as a matter of law, and I refer specifically to the recent Neff case in our Court of Appeals." (App. 74)

We believe it is fair to state that there was simply no evidence of how the accident happened or where decedent Bowman was when the accident happened.

The only negligence of Redding and Co. of which there was any evidence were the possible violations of the safety regulations regarding a bar and a notice of the bell system. Those violations (assuming them to have been such for pur-

poses of this appeal)[1] were shown to have occurred on the twelfth floor.

Appellant's evidence simply did not show the accident happened on the twelfth floor. Ernst Tonstad, Bowman's supervisor, testified that he had told Bowman to meet him on the twelfth floor. That occurred at 17th and Eye Streets, N.W., between 8:00 and 8:30 A.M., whereas the accident happened at 1025 Vermont Avenue, N.W., at about 9:07 A.M. Tonstad did not know where Bowman went after he left him, and Bowman was never seen on the twelfth floor. He was seen by the witness William Marginot on the eleventh floor, which was not where Tonstad had told him to go, so there is no basis for concluding that he did not go other places where Tonstad had not told him to go, such as the roof of the building.

Leonard Williams, the only witness to testify that he saw Bowman after the accident but before Bowman fell to the ground, saw Bowman hanging from the hoist cage at about the eleventh floor (App. 55), *coming down with the cage* (App. 56).

There was evidence upon which the jury could conclude that the accident happened above the eleventh floor, since Marginot testified that he was on the eleventh floor and saw Bowman fall past him. But there was simply no evidence to indicate whether Bowman had his original mishap on the twelfth floor or higher, on the roof. Since the evidence showed that Bowman was coming down with the cage, he could have originally fallen while on the roof

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[1] There is some question about whether appellant proved a violation of the regulation regarding a bar, in view of the testimony of Leonard Williams that at the time of the accident the bar was in place on the twelfth floor (App. 62, 67-68). The testimony from Farrar and Marginot as to the condition of the bar related to a period of time after the accident occurred. There was no showing that nothing disturbed the bar between the time of the accident and the time when Farrar and Marginot made their observations, which themselves differed one from the other.

rather than while on the twelfth floor. The hoist operator, Humphrey, testified that prior to the time he started the hoist cage down and just barely got it going a foot or so, it had been up on the roof (App. 29). While the jury is entitled to make reasonable inferences from the evidence, it must not be permitted to speculate or conjecture. As this court said in *Kenney v. Washington Properties*, 76 U.S. App. D.C. 43, 46, 128 F.2d 612, 615 (1942):

> "We have often said that, while a satisfactory conclusion may be reached through an inference from established facts, there must still be facts proved from which the inference can be drawn. No inference of fact may be drawn from a premise which is wholly uncertain."

In this case, appellant presented no evidence that Bowman did not go on the roof of the building, no evidence that he did not have the mishap on the roof, and no evidence upon which to base an inference that the mishap occurred on the twelfth floor rather than on the roof.

The law forbids a finding of responsibility on "evidence upon which the jury can draw an inference only by speculation. It must be proof that is positive to such a degree as that the inference naturally arises." *Levy v. Vaughan*, 42 App. D.C. 146, 160 (1914). When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent (or otherwise not responsible to the plaintiff) and also with one that he is, the plaintiff's proof establishes neither, he has failed to carry his burden of proof, and the defendant is entitled to judgment. *Capital Transit Co. v. Gamble*, 82 U.S. App. D.C. 57, 58, 160 F.2d 283, 284 (1947); *Kelly Furniture Co. v. Washington Ry. & Electric Co.*, 64 App. D.C. 215, 76 F.2d 985 (1935). Cf. *Rule v. Bennett*, 219 A.2d 491, 495 (1966).

In order to recover, plaintiff had the burden of proving not only that Redding and Co. was negligent, but that its negligence was a proximate cause of the accident. Both negligence and causation must be proven to entitle a plain-

tiff to recover. *Richardson v. Gregory*, 108 U.S. App. D.C. 263, 281 F.2d 626 (1960).

Proximate cause is "that cause which, in natural and continued sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred." *Howard v. Swagart*, 82 U.S. App. D.C. 147, 151, 161 F.2d 651, 655 (1947); *S. S. Kresge Co. v. Kenney*, 66 App. D.C. 274, 86 F.2d 651 (1936).

Clearly, any negligence by Redding and Co. in failing to maintain a proper bar on the twelfth floor, or in failing to post a proper notice of the bell signal system on the twelfth floor, cannot have been such a cause of a fall by Bowman from the roof of the building. Appellant, by failing to prove that the fall took place from the floor on which the violations existed, failed to prove causation.

"Negligence alone does not equal liability. A simple breach of duty having no causal connection with the injury cannot produce legal responsibility." *Richardson v. Gregory, supra*, 108 U.S. App. D.C. 263, 266, 281 F.2d 626, 629 (1960). See also *Ross v. Hartman*, 78 U.S. App. D.C. 217, 218, 139 F.2d 14, 15 (1943), cert. denied, 321 U.S. 790; *Howard v. Swagart, supra*, 82 U.S. App. D.C. 147, 161 F.2d 651 (1947); *Casey v. Corson & Gruman Co.*, 95 U.S. App. D.C. 178, 221 F.2d 51 (1955).

There is a complete void in the evidence and plaintiff does not even purport to have offered any evidence regarding what occurred between the time Bowman was seen by Marginot on the eleventh floor and the time he was subsequently seen on the outside of the building hanging from the hoist cage as it came down. Even if we were to indulge in the unwarranted speculation that Bowman was on the twelfth floor at the time of the accident, there is still no evidence establishing the vital causal connection between the negligence and the injury. There is no evidence that Bowman did not deliberately walk out on the ramp to look on the outside of the building. He had looked outside the

building on the eleventh floor, according to the witness Marginot, despite the fact that he had to make his way around Marginot's scaffolding (App. 33). There is no evidence that Bowman was not pushed outside the building. There is no evidence that he did not have a heart attack, dizzy spell or other faintness which caused him to fall in such a way that, unaffected by whether a bar was or was not in place, he was struck or caught by the ascending or descending cage. He may have been standing on the cage, attempting to get off it when it started to move, and thereby caused to fall. As the District Court stated:

> "There was no evidence as to how or why decedent left the building, travelled platform three feet, and encroached upon the eight-inch clearance for the cage in order for him to have been where contact with cage was possible. The court is of the view that for the jury to so find would require pure speculation or conjecture" (App. 73).

Since appellant's evidence failed to show how the accident happened, there is no showing of *what* caused the accident and, *a fortiori*, no showing that any negligence of Redding and Co. caused it. As this Court stated in *Kasmer v. Sternal*, 83 U.S. App. D.C. 50, 52, 165 F.2d 624, 626 (1948), a malpractice action against a dentist for allegedly causing cancer of the tongue, when the evidence

> "goes only so far as to show that the cancer might have resulted from any one of several causes, for only one of which defendant may be responsible, it fails to make out a case. . . .
>
> "Here, as we have seen, we have a case in which there is not a jot or tittle of evidence as to what caused the cancer. There is accordingly a total lack of evidence on which to base a conclusion that anything defendant did or failed to do produced that result. In such a case a jury may not speculate, and this is true even if it were shown that what defendant did might or might not have caused the cancer, for in such case the vital question would still be left wholly in the realm of conjecture."

Cf., e.g., *Ayers v. Parry*, 192 F.2d 181 (3 Cir., 1951), cert. denied, 343 U.S. 980.

Even where negligence is shown, it must be shown by evidence to have caused the accident. See, for example, *Sheldon v. James*, 175 Cal. 474, 166 Pac. 8, 2 A.L.R. 1493, 1497 (1917), where the court held that a defendant shown to have backed his automobile without giving any signal or warning cannot be held liable unless plaintiff was injured *because* of the absence of the signals.

Appellant's position in this case is based upon faulty reasoning in connection with application of the doctrine that violation of a safety ordinance may be evidence of or constitute negligence. There is no doubt about that proposition. Appellant further argues that negligence which consists of a violation of a regulation may be the proximate cause of an injury. That is also a correct proposition. Appellant's reliance, however, is upon a further proposition, which is not correct, that is, that the fact of the violation itself constitutes evidence of proximate cause. The law is to the contrary, and requires that there be evidence that the negligence, whether it is the violation of a regulation or otherwise, proximately caused the injury. This is stated in the very case upon which appellant principally relies, *Ross v. Hartman*, 78 U.S. App. D.C. 217, 139 F.2d 14 (1943), cert. denied, 321 U.S. 790. In that case the defendant's agent had violated a traffic ordinance by leaving a truck unattended in a public alley with the ignition unlocked and the key in the switch. Within two hours an unknown person drove the truck away and negligently ran over the plaintiff. The trial court directed a verdict for the defendant on the ground that the act of leaving the car unlocked was not a proximate cause of the injury because the wrongful act of a third party intervened. This Court reversed, holding (a) that violation of the ordinance was negligence, (b) that the ordinance was intended to prevent injuries resulting from meddling by third persons with vehicles and (c) that the violation of the ordinance created

the hazard, brought about the harm and was therefore a proximate cause of the harm, even though another agency participated. It was clear as a matter of fact that the negligence, while not the sole cause, was a cause of the injury.

The Court in *Ross v. Hartman* specifically stated the requirement that the violation of the ordinance be a proximate or legal cause of the harm. The Court said:

> "If by creating the hazard which the ordinance was intended to avoid it brings about the harm which the ordinance was intended to prevent, it is a legal cause of the harm. This comes only to saying that in such circumstances the law has no reason to ignore and does not ignore *the causal relation which obviously exists in fact.*" 78 U.S. App. D.C., at 218, 139 F.2d, at 15 (footnotes omitted; emphasis supplied).

It could not be clearer that the causal relation must exist in fact, and must be shown by the plaintiff to exist in fact. If Bowman fell from the roof, no causal relation existed in fact between that fall and the alleged violations on the twelfth floor. This Court stated this point specifically in footnote 10 of the opinion in *Ross v. Hartman:*

> "This does not mean that one who violates a safety ordinance is responsible for all harm that accompanies or follows his negligence. He is responsible for the consequences of his negligence but not for coincidences. If in the present case, for example, the intermeddler had simply released the brake of appellee's truck, without making use of the ignition key or the unlocked switch, and the truck had thereupon rolled downhill and injured appellant, appellee would not have been responsible for the injuries because of the negligence of his agent in leaving the switch unlocked, since it would have had no part in causing them. In other words the fact that the ignition was unlocked, which alone gave the agent's conduct its negligent character, would have had nothing to do with bringing about the harm." 78 U.S. App. D.C., at 218, 139 F.2d, at 15.

The other case relied on by appellant, *Janof v. Newsom*, 60 App. D.C. 291, 53 F.2d 149 (1931), is to exactly the same effect, as the Court pointed out in *Ross v. Hartman*, 78 U.S. App. D.C., at 219, 139 F.2d, at 16. In *Janof v. Newsom*, the Court said that there is liability "if injury *results from* a failure to do the things which it is the obvious purpose of the statute to require." 60 App. D.C., at 293, 53 F.2d, at 151 (emphasis supplied).

Appellant's brief, at page 12, cites four cases in support of the proposition that proximate cause is a question of fact for the jury. That is true, of course, if there is *evidence* of proximate cause. In *Richardson v. Gregory*, 108 U.S. App. D.C. 263, 266, 281 F.2d 626, 629 (1960), the Court specifically said, "We have consistently emphasized that both negligence *and* causation must be proved before the plaintiff can have a verdict." The very point decided in *District of Columbia v. Nordstrom*, 117 U.S. App. D.C. 165, 168, 327 F.2d 863, 866 (1963), was that the violation of the regulation, while constituting negligence, is not a proximate cause as a matter of law. In *Karlow v. Fitzgerald*, 110 U.S. App. D.C. 9, 288 F.2d 411 (1961), there was evidence that the violation of the regulation (by allowing a dog to go on private property without consent of the owner) caused the harm (biting of the owner by the dog), so there was a jury issue. In *Whetzel v. Jess Fisher Management Co.*, 108 U.S. App. D.C. 385, 282 F.2d 943 (1960), where a tenant was injured by a falling ceiling, there was obviously evidence that violation of the regulation requiring proper maintenance of the ceiling was a proximate cause of the injury.

The fact that proximate cause may be a jury issue does not support appellant's position in this case. That it may be a jury issue reflects the fact that a plaintiff has the burden of presenting some evidence on the issue. Negligence, too, may be a jury issue, but if a plaintiff presents no evidence of negligence, a directed verdict for defendant will not be reversed on the ground that "negligence is a

jury issue." What appellant's brief fails to do is point to evidence of proximate cause in this case, which would have presented a jury issue in this case.

II

THE DISTRICT COURT CORRECTLY RULED THAT BOWMAN WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, AND REDDING AND CO. DID NOT HAVE THE LAST CLEAR CHANCE TO PREVENT THE ACCIDENT

This issue has been fully discussed at pages 6-14 of the brief of appellee Anthony Izzo Co., Inc. Rather than burden the Court with a repetition of the arguments made, appellee Redding and Co. adopts by reference that part of the other appellee's brief, pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure. This appellee will only add the following points:

(a) The Court would not reach this issue at all if it decides that the District Court was correct in ruling that there was no evidence of proximate cause. Only if this Court decides that the District Court erred in that ruling would this Court have to decide whether the District Court also erred in finding contributory negligence as a matter of law. For if there was no evidence of proximate cause, the defense of contributory negligence was not required.

(b) The last clear chance doctrine could not properly be applied on the facts of this case.[2] The evidence provided no basis for the invocation of the doctrine. Appellant relies in this connection solely on the fact that Robert Lee Humphrey, Redding and Co.'s hoist operator, stopped the hoist cage when Leonard Williams shouted for him to do so, and then raised it about two feet when Williams told him to do that (App. 23-24). Appellant's brief, at page 17, suggests that a "reasonable man might conclude that the

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[2]Appellant's pre-trial statement did not raise the issue.

hoist operator should not have raised the hoist without first investigating and having someone hold onto Bowman so that he would not fall." First of all, there is absolutely no evidence that Bowman fell because Humphrey raised the hoist. Williams did not see the fall at all, and Humphrey only said that Bowman hit the ground a few seconds after he raised the hoist two feet (App. 24). There is no evidence that Bowman's body was trapped, or that, if it was trapped, it was freed by the raising of the hoist, or that it was not falling before the hoist was raised. Second of all, there is no evidence that Bowman was not already dead by the time the hoist was stopped. The jury would have had to speculate as to whether the fall contributed to cause the death. Third of all, it would not be reasonable to conclude that it was negligent for a man in Humphrey's position to do just what he did. He heard another worker say "hold it," then "raise it," and he did so. He was not told why he was to hold it (App. 24, 25, 56), so he did not know a man might be trapped by the hoist. For all he knew at that time, the hoist might have been about to hit someone if it had not been stopped, or to cut someone in half if it had not been raised. It would be more reasonable to charge him with failure to use reasonable care if he had *failed* to "hold it" or "raise it" under these circumstances, if such failure had caused an injury, than to suggest that heeding those cries could possibly constitute failure to use reasonable care. Appellant's suggestion that Humphrey should have left the hoist as is while he "investigated" is beyond the reach of reasonableness. There is thus no basis for invocation of the last clear chance doctrine.

CONCLUSION

For the foregoing reasons, the judgment below in favor of appellee Redding and Co., Inc., should be affirmed.

Respectfully submitted,

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IN THE

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JAMES L. BOWMAN, Deceased,

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v.

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEE REDDING AND CO., INC.'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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APPELLEE REDDING AND CO., INC.'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Appellee Redding and Co., Inc., hereby petitions for rehearing of this appeal, and suggests a rehearing in banc, on the following grounds.

1. Proximate Cause

On the issue of proximate cause, this Court's February 16, 1971 opinion fails to deal with the question of whether there was any evidence from which the jury could conclude that the particular safety violations shown to exist in this case were in any way causally related to the injury or death of decedent, and misapplies the rule of *Ross v. Hartman*, 78 U.S. App. D.C. 217, 139 F.2d 14, 158 A.L.R. 1370 (1943), *cert. denied*, 321 U.S. 790 (1944).

The rule established by the *Ross* case is that violation of a safety measure may be negligence, and that where such negligence creates a hazard which is part of a chain of events leading to harm to plaintiff, the negligence is a proximate cause of the harm. The *Ross* case does not say, and obviously the law has not been, that any violation of a safety measure, negligence though it may be, and creator of a hazard though it may also be, is *ipso facto* the proximate cause of any harm thereafter suffered by any person at any place for any reason. The *Ross* rule permits the safety violation to be considered the proximate cause of an injury which has only a remote causal relationship to the violation, or whose occurrence has in fact been caused by a number of factors which include the safety violation. But the rule does require some causal nexus between the negligence and the harm.[1]

Under the Court's opinion in this case the requirement of some causal nexus would be destroyed. There was no evidence that the only safety violations shown in this case (lack of a bar and lack of a notice of the bell system on the twelfth floor) had any causal relationship to decedent's fall, since there was no evidence that decedent fell from the twelfth floor,[2] and no evidence of how or why the fall commenced.

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[1] This requirement is conclusively demonstrated by footnote 10 of the *Ross* opinion. 78 U.S. App. D.C., at 218, 139 F.2d, at 15.

[2] The Court's opinion, in footnote 9, characterizes this appellee's claim as being that decedent's fall began on the roof, not on the

The Court's basic answer to this contention appears to lie in its statements, at pages 14 and 15 of the opinion, that:

> ". . . (H)ere the safety regulations must be taken at least as broadly as protecting all those whose business brought them to the building under construction and the zone of danger,"

and that:

> "In the case at bar, the safety regulation itself envisions, and seeks to avoid, injury to a class of persons, here employees of a subcontractor, whose business brings them close in time, place and circumstance to the on-going violation. In such case the violation is itself proof of cause of injury, unless offset or rebutted as set forth above."

Under such a doctrine, this appellee would be liable, as a result of the two safety violations shown in this case, if any workman rightfully working on the particular building fell over a wheelbarrow in the basement, was hit while standing on the ground floor by a rock dropped from the second floor, or indeed suffered any other injury while within "the zone of danger" as defined by the opinion. Such an extension of liability without causal relationship completely negatives the express limitation set forth in footnote 10 of the *Ross* opinion, 78 U.S. App. D.C., at 218, 139 F.2d, at 15, under which it is *not* sufficient to establish liability merely to show that the person injured was one of a class whose business rightfully brings them "close in time, place and circumstance to the on-going violation."

This appellee believes that rehearing should be granted because the rule of proximate cause thus established by the opinion in this case would completely and unjustifiably change existing law which requires some causal relationship between the negligence and the harm. The law must continue to require *both* that the person injured have been

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twelfth floor. In fact, this appellee's argument was that plaintiff had failed to present evidence from which the jury could do other than speculate as to where the fall commenced.

within the class intended to be protected by the regulation and that the safety violation bear some causal relationship to the injury.

The defect in this Court's opinion on this issue cannot be more effectively stated than in the language this Court used in *Richardson v. Gregory*, 108 U.S. App. D.C. 263, 266, 281 F.2d 626, 629 (1960), as follows:

> "Negligence alone does not equal *liability*. A simple breach of duty having no causal connection with the injury cannot produce legal responsibility. The car in question may lack automobile registration tags—a clear violation of statute or regulations—but this omission could hardly be a proximate cause or contribute to injury in a legal sense; hence it is of no consequence. See Ross v. Hartman, supra, 78 U.S. App. D.C. at page 218, note 10, 139 F.2d at page 15; Howard v. Swagart, 1947, 82 U.S. App. D.C. 147, 161 F.2d 651; Casey v. Corson & Gruman Co., 1955, 95 U.S. App. D.C. 178, 221 F.2d 51. We have consistently emphasized that both negligence *and* causation must be proved before the plaintiff can have a verdict. Danzansky v. Zimbolist, supra, 70 App. D.C. at page 236, 105 F.2d at page 459. It is here that causation concepts are both appropriate and essential since use of the terms "negligence as a matter of law" carries an emotional impact which might easily lead juries to to equate *negligence* and *liability*. A proper emphasis on the element of causation must be utilized to put the "negligence per se" doctrine in proper perspective."

2. Autopsy Report

On the issue of the admissibility of the autopsy report, this appellee relies on the argument of appellee Anthony Izzo Co., Inc., in its petition for rehearing and suggestion for rehearing in banc, at pages 7 through 9.

3. Presumption of Continuing Life

On the issue of the presumption of continuing life, this appellee relies on the argument of appellee Anthony Izzo Co., Inc., in its petition for rehearing and suggestion for rehearing in banc, at pages 9 through 11.

4. Last Clear Chance

The issue of last clear chance has two aspects in this case. The first aspect relates to whether the doctrine may be invoked against a defendant whose negligence has not contributed to plaintiff's peril. This aspect relates to appellee Redding and Co., Inc., if the issue of proximate cause discussed above is resolved in this appellee's favor, since the only other alleged negligence of this appellee, the action of the hoist operator Humphrey in raising the hoist, occurred after the alleged contributory negligence of decedent. As to this aspect of the last clear chance issue, this appellee relies on the argument of appellee Anthony Izzo Company, Inc., in its petition for rehearing and suggesting for rehearing in banc, at pages 4 through 7. If this aspect of the issue were resolved in appellees' favor, there would be no need to consider the second aspect.

The second aspect of the last clear chance issue relates to the effect of a sudden emergency. This Court's opinion concedes that the last clear chance doctrine does not apply where the emergency is so sudden that there is no time to avoid the accident, for the defendant is not required to act instantaneously, citing *Dean v. Century Motors*, 81 U.S. App. D.C. 9, 154 F.2d 201 (1946). The continuing vitality of this exception is illustrated by *Frost v. Benedict*, 118 U.S. App. D.C. 26, 27, 331 F.2d 772, 773 (1964), where the Court pointed out:

> "The last clear chance doctrine, as its name implies, has to do with not merely the *last* chance to avoid injury but a *clear* chance as well.

See also *Jenkins v. Young,* 135 A.2d 319, 320 (D.C. Mun. App., 1957).

By holding that the action of this appellee's employee in raising the hoist, under the circumstances of this case, where a call from another employee gave rise to the need for instantaneous action in connection with a peril (if indeed any peril still existed) of which this appellee's employee was unaware, this Court would effectively destroy the previously existing requirement that a last clear chance be a clear chance.

The holding in this case would also destroy the previously existing rule that the plaintiff has the burden of proving that the defendant had a last clear chance. *Frost v. Benedict, supra.* In the *Frost* case, the Court pointed out that the plaintiff had not met her burden "simply by suggesting speculative alternatives." 118 U.S. App. D.C., at 27, 331 F.2d, at 773. In this case, appellant at best suggested speculative alternatives as to what the hoist operator should have done under the circumstances. The hoist operator did not see decedent, and he was therefore without any direct knowledge of decedent's peril, if any, or of the nature thereof. He heard another employee shout "Hold it!" or "Hold it!" and "Raise it up a little bit." There was absolutely no evidence that he was told or that he knew someone was in peril, or what the peril was. See App. 24, 25, 56. That in itself is enough to require the conclusion that appellant did not carry her burden of presenting evidence from which the jury could permissibly find this appelle had a last clear chance to avoid the accident. In addition, however, appellant also failed to present evidence from which the jury could do other than speculate as to whether the hoist operator's action in raising the hoist had any effect on decedent, since appellant did not show that decedent was still alive at the time or, even if he was, that raising the hoist contributed to his fall. As far as the evidence goes, it would have been equally justified for the jury to speculate that it would have been negligent for Humphrey

to fail to raise the hoist as that it was negligent for him to have raised it.

As the foregoing demonstrates, the Court's holding on the last clear chance issue in this case would not only destroy the sudden emergency exception to that rule, and shift the burden of proof on this issue from the plaintiff to the defendant, but would also destroy the previously existing requirement that a defendant, to be liable under the last clear chance doctrine, must have been aware or reasonably required to have been aware of the plaintiff's danger. See *Frost v. Benedict, supra; Gay v. Augur,* 97 U.S. App. D.C. 236, 231 F.2d 495 (1956); *Capital Transit Co. v. Grimes,* 82 U.S. App. D.C. 393, 164 F.2d 718 (1947), *cert. denied,* 333 U.S. 845 (1948). For, as pointed out above, Humphrey (and therefore this appellee) was not aware of the peril to decedent.

A decision having such major effects on existing law should be reconsidered by the Court in banc.

5. Contributory Negligence and Burden of Proof

If the foregoing issues were resolved favorably to appellee, there would be no need for the Court to reach the issues of contributory negligence in connection with violations of safety regulations and of shifting the burden of proof as to which of two negligent defendants caused the death. If these two last issues do require consideration in this case, it is apparent on the face of this Court's opinion that basic new rules are adopted for this Circuit. It is respectfully suggested therefore, that rehearing in banc is appropriate under the circumstances.

For the foregoing reasons, this appellee respectfully requests that the Court grant rehearing in this case, and suggests that the rehearing be by the Court in banc.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,932

BETTY JOE BOWMAN,
Executrix of the Estate of
James L. Bowman, Deceased,

Appellant,

v.

REDDING AND CO., INC., and
ANTHONY IZZO CO., INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE, ANTHONY IZZO CO., INC.

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BRIEF FOR APPELLEE,
ANTHONY IZZO CO., INC.

(COUNTER)STATEMENT OF FACTS

The Appellee, Anthony Izzo Co., Inc., the brick mason subcontractor on the job site at which Plaintiff's decedent met his death, believes that some elaboration on the statement of facts submitted by Appellant is appropriate so as to present to the Court a picture of the posture of the case at the conclusion of Plaintiff's

case in the trial court. With that in mind, the following appears appropriately worthy of note and inclusion in this counter and/or supplemental statement:

The decedent, James L. Bowman, had worked alone on this job where he ultimately met his death and other caulking jobs during his eighteen months of service as a caulker apprentice (App. 4, 9). On March 9, 1964, decedent was sent to this job site by his foreman, Ernst Tonstad, who told the decedent he would meet him on the 12th floor of the building under construction (App. 5). Tonstad, in the meantime, was to travel to the shop located in Alexandria, Virginia and pick up certain material needed for the job (App. 5). The deceased met his death during the 30-45 minute period that it took Tonstad to travel to the warehouse in Alexandria or shortly thereafter, while Tonstad was still at the warehouse (App. 9). The witness, Tonstad, explained that his trip to the warehouse was to obtain caulking material and ochre, the latter being used for a backstop, i.e., it is material placed in the cavity around a window in order to caulk (App. 9). On that morning that Bowman was sent to the Vermont Avenue job, there was no ochre on the job site and consequently, Bowman could not have worked until Tonstad obtained the ochre and returned to the job (App. 9). Caulking had been done on this job on floors 1 through 11 and the 12th floor was the only remaining floor for completion (App. 10). The windows on the 12th floor were pivot windows, which would have to be opened before one could apply the ochre and the windows had to be opened by the use of a key. All of the windows on the 12th floor had glass in them and were locked (App. 11). The key for the windows had not been obtained in order to accomplish the caulking of these windows (App. 11). Once the key was obtained and the windows opened, then the workman would stand on the floor and reach out and apply the material to the outside of the edge (App.

12). Neither the witness, Tonstad, nor any of the employees of Vinge Company used the hoist for the carrying of materials and in fact to do so would have been contrary to the instructions of their employer—they carried their materials and tools by hand. This hoist had been on the job throughout the period of time that Vinge Company employees worked on the job and the policy of Vinge Company, that the hoist was not to be used by its employees, was made known to all of its employees and consequently, there was no reason for any employees of Vinge Company to get on or near the platform leading to the hoist or on the hoist itself to perform his work or for any purpose (App. 12).

When the witness, Tonstad, did return to the Vermont Avenue job following the report of decedent's accident, he looked at the caulking gun tool which the decedent had with him on the job and it was clean, which indicated to the witness that decedent had not used the gun that morning (App. 13).

The hoist operator, Humphrey, after describing the hoist and the standard signals respecting the use of the hoist (App. 21), testified that just before the happening of the accident, he heard three bells signalling to him that he should lower one of the cages in the hoist and that he started to move the cage down, when he heard the laborer, Williams, say, "Hold it." (App. 23) Then Williams told him to raise the cage up a little bit and he raised it about 2 feet and put a safety latch on that held the cage in place. A few seconds thereafter, the decedent fell to and struck the ground (App. 24, 25). In explaining his testimony, the witness, Humphrey, stated that the cage had been on the roof and when he received the signals to lower the cage, it had only been moved downward a foot or so when Williams told him to hold it and thereafter, he moved it up about two feet and put it in a safety position (App. 29).

The witness, William Marginot, a sheet metal worker, saw the body of decedent as he fell doing a cartwheel as the body was falling outside of the elevator shaft to the ground (App. 33). The witness was aware that the hoist had been in operation that morning (App. 36). Since there was no cable in sight outside of the 11th floor area where the witness was working immediately after the accident, this meant to him that the cage was in an area above the 11th floor (App. 36). As he saw the body going down the shaft of the hoist, the witness heard no noise or sound or scream (App. 41).

Leonard Williams, a laborer in the employ of Anthony Izzo Co., was working at ground level in the vicinity of the operator of the hoist. He and other employees of the company were transporting material from the ground to the roof by one of the cages in the hoist on the morning of decedent's accident and the general contractor was using the other cage (App. 49). Just before the accident, this witness heard the bell ring three times, which was the signal for the lowering of the cage from the roof (App. 52, 53). He looked up and saw that the cage was coming down and at first did not see anybody but when the cage got to about the 11th floor, he saw the feet of a man and yelled, "Hold it." He could see nothing but his legs and the witness concluded that the upper portion of the body of the man faced the building (App. 55). He hollered at the operator of the hoist to stop the cage and it was stopped. He turned away from the sight as he could not stand to see the decedent hit the ground (App. 56). The witness denied that he gave any signal to the hoist operator other than to "hold it," and specifically denied that he told the hoist operator to raise the cage (App. 56). The witness further stated that when he first observed the legs of decedent, the cage was moving and the body was coming down with the cage and that he did not know how he got caught and could only see the lower part of the body (App. 56). Mr. Williams also testified that each of the cages that move up and down the shaft are

heavy and that he had noted the presence of a safety bar extending across the opening to the ramp on each floor of the building (App. 63, 64; 68).

The stipulations entered into during the course of the trial and as referred to by Appellant at pages 6 and 7 of her brief, were in fact stipulations between Plaintiff and the general contractor-appellee, Redding & Co. only.

During the course of the testimony of the witness, Leonard Williams, a combination of efforts were made by Plaintiff's counsel to allegedly refresh the witness' recollection or to impeach him by the use of a handwritten statement, which is identified in the record as Plaintiff's Exhibit #9. The interrogation of the witness and the discussion respecting the matter appear in the Appendix at pages 57-60. The Court sustained the objection to the admission of the statement, which the witness could not read because he was unable to read and which he had not written though, admittedly, his signature appeared thereon. The witness denied that the document refreshed his recollection in any way and there was no foundation laid for the impeachment of the witness. It is accurately stated by Appellant that before directing a verdict in this case, the trial judge did read Plaintiff's Exhibit #9 but stated that the exhibit "was of no importance in view of the action by the Court in granting the motions for directed verdict." (App. 76)

The tender of Plaintiff's Exhibits #12 and #13, the autopsy report and Certificate of Death, respectively, were made by counsel without, as stated by the trial judge in his opinion, any "proffer of evidence interpreting the autopsy report and death certificate which would show whether the injuries which resulted in death were attributable to pinning or to the fall." (App. 75)

ARGUMENT

I

THE TRIAL COURT CORRECTLY FOUND THAT DECEDENT WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW

The trial judge, in ruling upon the motions of the several Defendants for directed verdicts, granted the motion of Appellee, Anthony Izzo Co., Inc., as well as that of the Appellee, Redding & Co., Inc., on the grounds, amongst others, that Plaintiff's decedent was guilty of contributory negligence as a matter of law. Interspersed throughout the opinion of the Court, recited from the bench as the ruling of the Court, are matters of evidence supported in the record, which dictated the very ruling referred to herein. The trial judge found from the evidence that decedent was an experienced apprentice caulker, qualified to be a mechanic, who had been sent to a job site and told to go to the 12th floor and await the return of his foreman with certain caulking material. The caulking of the windows was done from the inside of the building and therefore, there was no requirement for the decedent to have exited from the building and walk on the platform leading to the hoist in connection with his work. Actually, the hoist was not used for transporting caulking material and in fact, the instructions of decedent's employer were to the effect that the materials were to be carried on the job by the individual workman. The trial judge found the record completely silent as to how and why the decedent had left his place of safety and arrived at the point where he was pinned between the cage and platform and thereafter fell to the ground. Additionally, the trial judge found that this accident occurred in broad daylight with the hoist cage at penthouse or top level just one floor above the 12th floor where the pinning of decedent occurred; that the bell signalling the descent of the cage, sounding loudly and with no showing that decedent was impaired in hearing or eyesight and there being

obviously present the large hoist at the end of the platform, extending three feet out from the building with an eight-inch clearance between the end of the platform and the cage, all such things being considered, clearly indicated that Plaintiff's decedent was contributorily negligent. The trial judge referred to the recent decision of this Court in *Joan S. Neff, Administratrix of the Estate of John W. Neff v. U.S.A.*, ___U.S.App.D.C.___, 420 F.2d 115 (1969), where it was held that Plaintiff's decedent was contributorily negligent as a matter of law in that he had attempted "to take off into an obvious thunderstorm." In its opinion, the Court stated:

> ". . . It is well established that 'contributory negligence may consist not only in a failure to discover or appreciate a risk which would be apparent to a reasonable man, . . . but also in an intentional exposure to a danger of which the Plaintiff is aware.' W. Prosser, Torts, 434 (3d ed. 1964); see also Friedman v. Beck, 250 App.Div. 87, 293 N.Y.S. 649 (1937). Under this standard, First Officer Neff must be deemed guilty of contributory negligence.[3]"

"[3]In addition, the trial court relied upon the 'well-established presumption that airline pilots act with diligence and due care when their lives are at stake' (App. 39). This presumption undoubtedly has great utility in many negligence actions arising out of airline accidents, since testimonial evidence is frequently sparse or nonexistent in such cases; here, however, both parties produced an abundance of evidence and it was possible for the trial court to reconstruct the events leading up to the crash in exhaustive detail. Thus, any effect that the presumption might have had was certainly overcome; cf. Bratt v. Western Air Lines, Inc., 169 F.2d 214 (10th Cir.), cert. denied, 335 U.S. 886 (1948); Rowe v. United States, 272 F. Supp. 462 (W.D. Pa. 1964)."

The cases are legion which charge a Plaintiff with the duty to look and the law will charge a Plaintiff with responsibility for his own injuries in those instances where the duty existed and a Plain-

tiff attempts to testify or to demonstrate that he looked and failed to see the danger there to be seen. See *Landfair v. Capital Transit Co.*, 83 U.S.App.D.C. 60, 165 F.2d 255 (1948) and the cases cited therein; also, *Albaugh v. Pa. R. Co.*, 120 F.Supp. 70, 73, affirmed 95 U.S.App.D.C. 82, 219 F.2d 764 (1955).

In *Fitzpatrick v. Fowler*, 83 U.S.App.D.C. 299, 168 F.2d 172 (1948), this Court affirmed the lower Court's direction of a verdict in favor of a defendant-employer of Plaintiff, who was a household worker in Defendant's home and who suffered injury on the premises. In the opinion of this Court, at page 174, in treating the subject of assumption of risk, this Court stated:

> "This brings us to the question of assumption of risk. Appellant contends it was error for the court below to hold that appellant assumed the risk causing the injury. But we find it well established that an employee assumes not only the ordinary risks incident to his employment, but also any extraordinary risks which are obvious or fully known and appreciated by him. (cases cited) . . . The plain import of the common law doctrine of assumption of risk is that if the employee knew of the dangerous condition, or could have known of it by the exercise of reasonable care, he should be held to have assumed the risk incident to such danger, for he is presumed to see and understand dangers that a prudent person would see and understand, which he might protect himself against by exercising reasonable care for his own safety. (Cases cited) . . . And where the risk of danger was or must have been known to the injured employee, it is immaterial that it may have been forgotten at a critical moment." (Cases cited)

In *Green v. Pyne*, 53 App.D.C. 271, 289 F. 929 (1923), this Court affirmed the direction of a verdict in favor of a Defendant homeowner who had employed the Plaintiff to wash windows.

Plaintiff's accident occurred on the second occasion that he washed the windows and he was caused to fall from a window which lacked window cords, which was known to the Defendant but allegedly unknown to the Plaintiff. Plaintiff was standing on the sill outside of the window holding the lower end of the upper sash with one hand and washing the glass with the other, at which time the lower sash fell, striking Plaintiff's hand and causing him to fall. In the opinion of the Court, the following language appears at page 273:

> "Plaintiff was an experienced window washer, and the evidence indicates that he was engaged as such by the defendant. Defendant was concerned solely with the result of the work, and not as to the manner or mean of accomplishment. As to this the plaintiff was a free agent. When he approached this large third-story bay window it was for him to decide, after inspection, how he should do this particular part of his work, and what safeguards he should adopt for his own protection. He knew or should have known that to stand on a window ledge and depend for his safety upon a hold by one hand was in any aspect a dangerous undertaking. Certainly, before subjecting himself to the dangers inherent in such a situation, common prudence dictated that he should have made a careful inspection of the window, to the end that precautions be taken against the possibility of the window falling in the manner detailed. When he found that the upper sash was fastened, it was his duty, if he could not release it, to bring the matter to the attention of the defendant, that she might have it released. The discovery of its condition certainly did not justify him in exposing himself to the dangers incident to standing on the narrow window ledge, without first making sure that there would be no interference with his hold.

> "While plaintiff testified that he 'did not look to see' whether there were any cords in the window, it is inconceivable that, had he permitted his senses to function, he would not have discovered the absence of the cords. The evidence shows that the lower sash of this window was almost four feet square, and, according to the plaintiff's testimony, it moved freely until near the top. On the first occasion, he not only raised this heavy window, but must have lowered it when his work was finished. It is common knowledge that such weights are attached to the cords as will properly balance the weight of the window and thus minimize the difficulty of raising and lowering it. The raising and lowering of this window on the first occasion and the raising of it again on the second occasion inevitably must have demonstrated to this plaintiff the absence of the cords and weights, or that something was wrong. There is no suggestion that the defendant directed or authorized the plaintiff, who presumably was in a far better position than she to appreciate the danger, thus to expose himself. He alone was responsible for his failure to exercise common prudence, and this conclusion is fully supported by the authorities."

In the case of *Otis E. Smith v. John B. Kelly, Inc.*, 107 U.S. App.D.C. 140, 275 F.2d 169 (1960), this Court affirmed the entry of summary judgment in favor of the Defendant in an action arising out of an accident that occurred in Maryland and as to which Maryland law was applied. The Plaintiff in that case was an experienced construction superintendent who rode a hoist which was supposed to be used for the transportation of materials and suffered an injury. The Court treated several questions that were involved in the litigation but that which is pertinent to our consideration in the instant case is referred to at page 143 of the opinion, where this Court stated:

"Secondly, it is quite clear that the assumption of risk doctrine precludes a recovery by plaintiff. While that doctrine is sometimes held to apply only to cases arising out of the master-and-servant relationship, or at least to cases involving a contract relationship, it is now quite generally held that the doctrine applies to one who deliberately exposes himself to danger. Thus the general law is stated in LeVonas v. Acme Paper Board Co., 1944, 184 Md. 16, 23, 40 A.2d 43, 46:

> 'When a person undertakes work which exposes him to obvious dangers which he knew or had the opportunity to know, he must be considered as having assumed such risks, and he cannot recover for any injuries resulting therefrom.'

"Complaint is made that the wheels of the buggy were not blocked and the brakes thereof not applied; but, as plaintiff was not only on the lift but also on the seat of the buggy itself, and was the only person there, these facts were or should have been perfectly obvious to him. Here, certainly, plaintiff deliberately incurred the risk incident to the use of the lift—an instrumentality which he knew to be dangerous. From his own experience in construction work and from the fact that specific instructions had been issued against such use of the lift, he must have been aware of the danger involved and assumed the risk thereof."

In the case of *Helen McKey, Administratrix of the Estate of Agnes Littlejohn v. Kenneth Fairbairn,* 120 U.S.App.D.C. 250, 345 F.2d 739 (1965), this Court again expressed itself on the subject of contributory negligence as a matter of law in the instance of a suit by the mother-in-law of a tenant against the owner of the premises and her real estate agent and at page 253, 254 of the opinion, the following appears:

"In addition to the foregoing, there is another reason for upholding the trial court's action in directing a verdict for the defendants. There was no possibility of constructive notice to the landlord about the wetness of the floor of Mrs. Littlejohn's room. But she was well aware of the condition, as shortly before she had mopped the floor twice. Then, on re-entering the room to awaken her grandson and get her coat, she slipped on the floor she knew was wet. She had not forgotten it, but was thinking only of getting her coat to go to work. This was a frank admission that her own negligence caused the accident, for of course one can walk on a wet floor without falling if the condition is known and proper care is exercised.[6] Thus, even if it be thought that somehow appellees were negligent, the trial judge would have been justified in instructing the jury that Mrs. Littlejohn was contributorily negligent as a matter of law. . . ."

"[6]This court has not heretofore considered a comparable question, but in Safeway Stores, Inc. v. Feeney, 163 A.2d 624, 627 (1960), the Municipal Court of Appeals (now the District of Columbia Court of Appeals) dealt with a similar situation. There, in the darkness, Feeney fell over a hand truck on the sidewalk. The court found that he knew of the hazardous condition, relied on his own statement that he 'never gave it a thought,' and held contributory negligence as a matter of law. The opinion said:

> 'Appellee not only failed to pursue the safe course, but in passing along the north side of the street he approached the unloading area "automatically" and in spite of his knowledge and past complaints he "never gave it a thought" that he might encounter something in the dark. Absentmindedness and forgetfulness not the product of a sudden emergency or other compelling circumstances are no excuse for the failure to exercise at least ordinary care in approaching areas of known danger.* * *"

In discussing the subject of contributory negligence, the Appellant suggests that the instant case is "more like *Hewitt v. Safeway Stores, Inc.*, 131 U.S.App.D.C. 270, 404 F.2d 1247 (1968)." Appellee suggests that this reliance is misplaced. Not only is the *Hewitt* case a Maryland case, as indicated by Appellant but the opinion of this Court clearly reflects that its opinion is based upon consideration of a Maryland statute and certain industrial regulations, as well as certain of the decisions of the highest Court of the State of Maryland. In this Court's opinion, appearing at page 271 of the *Hewitt* case cited supra, the following appears:

> "Finkelstein v. Vulcan Rail & Construction Co., 224 Md. 439, 168 A.2d 393 (1961) is a construction site case. The Maryland court has made clear that these are a separate category with higher hurdles confronting the injured employee. Finkelstein itself points out that the duty to provide a safe place to work has but 'limited application' in cases involving the erection and construction of buildings."

Furthermore, in *Finkelstein*, cited supra, the Court stated, in that portion of the opinion relating to assumption of risk:

> "But in the erection and construction of buildings this rule can have but a limited application; for it most often happens that the dangers of such work are open and obvious, and hence that the risk of accident is assumed by the employee . . . This is specially true where the danger to which the employee is exposed is merely transitory, due to no fault of plan or construction. . . ." (Cases cited)

Amongst the authorities cited by the Court of Appeals of Maryland for its statement as appearing immediately above is the case of *Decatur v. Charles H. Tompkins Co.*, 58 App.D.C. 102, 25 F.2d 526 (1928). This case involved a construction site accident in that plaintiff-carpenter was injured when he stepped upon a nail protruding

from a piece of board lying on the job site which was covered by fresh dirt. In this Court's opinion, it acknowledged that in general, an employer is bound to furnish his employee with a reasonably safe place within which to work but that, just as in the Maryland cases, this rule can have but limited application where the situs of the accident is a construction job. This Court held that the Plaintiff's injury arose from a well known incident of the work occurring on and about the building and that Plaintiff was aware of the very dangerous incident to his employment which resulted in his accident and consequently assumed the risk of the accident.

It seems to Appellee that in many of the cited cases and other authorites, particularly in the earlier ones, the terms assumption of risk and contributory negligence have been interchangeably used. Because of this, the pertinence of the decisions spelling out application of the doctrine of assumption of risk as a matter of law is obvious. Irrespective of the term of defense employed, the evidence in the instant case compelled a finding as a matter of law, that the deceased did in fact leave a place of safety and exposed himself to obvious danger and that there could be no conclusion to the contrary. This was, indeed, the proximate cause of his death.

II

THE TRIAL COURT PROPERLY HELD THAT APPELLANT HAD FAILED TO PROVE THAT ANY ACT BY APPELLEE, ANTHONY IZZO CO., INC., WAS THE PROXIMATE CAUSE OF THE INJURIES TO DECEDENT CAUSING HIS DEATH.

The evidence in this case to be considered at this point is quite limited. Only two men saw the decedent following the happening of his accident. The first of these was Mr. Williams, the laborer, who described looking up and in the direction of the descending cage and at first not seeing anyone but that as the cage arrived at

about the 11th floor, he "saw this man, like he were hanging. I could not see nothing but his feet. It scared me so bad I just come hollering, 'hold it, hold it.'" As the witness Williams continued to testify, he described further the position of the decedent as facing the building, pinned between the cage and the edge of the platform. He saw the lower portion of the decedent from the belt line extending below the joist. When asked if the cage was at a standstill when he saw the decedent pinned,the witness indicated that the decedent was coming down with the cage and could not explain how he got caught. In several of the questions propounded to the witness on this subject, Appellant's counsel employed the word 'dangling' in reference to the feet of the decedent but there is nothing in the record which suggests any motion of the feet (App. 55, 56). Furthermore, the second witness, Mr. Marginot, saw the body of the decedent as decedent fell, somersaulting without outcry or sound, to the ground.

Apparently, the Appellant agrees that it was her burden to establish negligence on the part of Anthony Izzo Co., Inc., which proximately caused the death of James Bowman and further, that such proof must be sufficient so that the subject matter would not be one left in a state of conjecture or speculation. The contention as made is that the trial court on this particular subject failed to weigh the presumption of continuance of life and to hold that such presumption, under the circumstances, created a prima facie case on the subject of causation. Appellant cites *Krell v. Maryland Drydock Co.*, 184 Md. 428, 41 A.2d 502 (1945), which, is, indeed, a well written and documented opinion on the subjects of the presumption of death and/or of continuance of life. The decision containing numerous authorities clearly reflect the frailty of the presumption of continuance of life and the slight proof and/or circumstances which are sufficient to overcome this presumption. In the case of *Groff v. Groff*, 36 App.D.C. 560, (1911), this Court, in an action

involving a contest over the settlement of an estate, treated the very subject with which we're concerned. The specific question was whether the evidence in the case was sufficient to overcome the presumption of continuance of life. Noting that seven years had not elapsed at the time of the death of the testator since the disappearance of one Adam Groff, the Court stated, at page 564 of its opinion:

> "The burden of proof therefore rested upon the caveators to establish his death, and overcome the presumption of the statute. It is somewhat difficult, under the decisions of the courts, to determine just what state of facts is sufficient to overcome this presumption. The rule, however, seems to be that, in order to overcome the presumption, it must appear that the absent person, during the period after his disappearance, encountered some specific peril or was subject to some immediate danger, inconsistent with the continuation of life, or that there were facts and circumstances surrounding his disappearance and absence which would lead to a conviction that death had occurred within a shorter period than that prescribed by the statute.
>
> "In the case of Davie v. Briggs, 97 U.S. 628, 24 L.Ed. 1086, the Court said:
>
> > 'If it appears in evidence that the absent person, within seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years.' . . ."

Appellee respectfully submits that there is no more classic an illustration than supplied by the present record of valid reason to conclude that the presumption of continuance of life had termi-

nated. The plight of decedent as described by the one witness who saw him before he fell to the ground is certainly the description of one who had encountered a specific peril and was subject to immediate danger inconsistent with the continuation of life.

Appellant further contends that because of the benefit derived from the presumption of the continunance of life, she did not have the burden of proof "as to the issue of establishing the time at which death occurred, but that the Appellee, Anthony Izzo Co., Inc., had the burden of proving that the decedent died by the pinning rather than by his fall of 12 floors to the ground." Such contention as this was resolved in the early case in this Court of *Carmody v. Capital Traction Co.*, 43 App.D.C. 245 (1950), in which case Plaintiff's intestate was struck by Defendant's vehicle and died three and one-half months thereafter. The trial court refused to grant an instruction requested by Plaintiff which cast the burden of proof upon the Defendant, of establishing by a preponderance of the evidence, that the death of Plaintiff's intestate was caused not from the accident, but from his diseased condition, which existed prior to the date of the accident. In the opinion of the Court, appearing at page 253, it is stated:

> ". . . The defense that Carmody's death was not the proximate result of the accident was not an affirmative defense. On the whole case, therefore, the burden was cast upon plaintiff of proving her right to recover. If the evidence established that Carmody's death was caused from disease, and not from the accident, plaintiff simply failed to sustain the burden which the law cast upon her.
>
> "No defense of contributory negligence is here relied upon, but the general defense that defendant's act was not the cause of Carmody's death. Hency there is no analogy between this case and the affir-

mative defense of contributory negligence in personal injury cases. The defense of contributory negligence implies an admission on the part of defendant that it was guilty of the negligent act which caused the injury, but that the injured party was guilty of negligence that contributed to cause the injury.

"The general burden is on the plaintiff of establishing her whole case by a preponderance of the evidence to the satisfaction of the jury. 'The questions of evidence that arise in actions for death are, for the most part, the same as those that arise in ordinary personal injury cases.

"* * * As in other actions, the burden of proof is upon the plaintiff to establish his case, including the fact that the death was caused by the wrongful act or neglect or neglect of the defendant by a preponderance of evidence. Tiffany, Death by Wrongful Act, 2d ed. 1913, § 189."

The language of the statute creating this special remedy "negligence causing death" clearly provides for proof of causation on the part of Plaintiff (see Title 16, § 1201, D.C. Code, 1961 ed.)

It was therefore an integral part of Plaintiff's case, a prerequisite to the establishment of a prima facie case, that she show that the alleged act of negligence attributed to Anthony Izzo Co., Inc. was the cause which produced the injury and death and without which the resulting death would not have occurred. It is the essential cause—the one that necessarily sets in operation the factors that accomplish the injury. See *Howard v. Swaggert*, 82 U.S.App.D.C. 147, 167 F.2d 651 (1947) and *S. S. Kresge Co. v. Kenney*, 66 App. D.C. 274, 86 F.2d 651 (1936).

It is respectfully submitted that Plaintiff's proof never rose above the suggestion of a possible relationship, which quantum of

proof is insufficient. As stated by this Court in *Kasmer v. Sternal,* 83 U.S.App.D.C. 50, 165 F.2d 624 (1948), a malpractice action brought against a dentist for allegedly causing cancer of the tongue of the Plaintiff, it was stated at page 52:

> "When such evidence goes only so far as to show that the cancer might have resulted from any one of several causes, for only one of which defendant may be responsible, it fails to make out a case. Chicago, M. & St. P. Ry. Co. v. Voeller, 129 F.522, 530, 70 L.R.A. 264; Ewing v. Goode, C.C., 78 F.442.
>
> "Here, as we have seen, we have a case in which there is not a jot or tittle of evidence as to what caused the cancer. There is accordingly a total lack of evidence on which to base a conclusion that anything defendant did or failed to do produced that result. In such a case a jury may not speculate, and this is true even if it were shown that what defendant did might or might not have caused the cancer, for in such case the vital question would still be left wholly in the realm of conjecture. Falco's Case, 260 Mass. 74, 156 N.E. 691".

Of similar import is the case of *Belt v. St. Louis-San Francisco Ry. Co.,* 195 F.2d 241 (C.C.A. 10; 1952), which was an action for personal injuries and wrongful death, sustained by the decedent who had been fishing on a railroad bridge when struck and badly injured by a passing train. While lying adjacent to the track and fully conscious, a second train passed over the track causing considerable noise and vibration. The passge of the second train was in disobedience to the dispatcher and over the objections of the deceased's family. It was alleged by Plaintiff that the decedent had suffered serious injuries and pain, that the second train had caused shock and excrutiating pain and that the Defendant's negligence in the operation of both trains was the proximate cause of decedent's injuries

and resulting death. The jury found that the Defendant was negligent in the operation of its first train but that decedent was guilty of contributory negligence. The jury returned a verdict in the amount of $5,000.00 for pain and suffering and $900.00 for hospital and funeral expenses and the trial judge entered judgment notwithstanding the verdict for the Defendant. The Appellate Court reinstated the verdict of the jury for money damages as described as the verdict was expressly limited to damages for pain and suffering resulting from the passing of the second train but held that the evidence was insufficient to support an award of damages for the wrongful death of the decedent. This conclusion with respect to the insufficiency of the evidence to sustain a recovery for wrongful death was based upon the Court's analysis of the medical testimony to the effect that the passing of the second train was a contributing factor of increasing shock but the same physician was unable to say with any degree of certainty or probability that the negligent passing of the second train contributed to the death of decedent.

In treating this same subject, Appellant complains of the refusal of the trial judge to receive in evidence the autopsy report and death certificate. As pointed out by the trial judge in his opinion, there was objection to these documents and there was no intent on the part of Plaintiff to produce evidence nor was there proffer of same "interpreting the autopsy report and death certificate which would show whether the injuries which resulted in death were attributable to pinning or to the fall." The trial judge also commented that "to the extent that these documents were legally usable, on objection of opposing counsel, all the facts therein were already in evidence by stipulation or otherwise. There was no challenge of the fact that the decedent was pinned and that, when the cage was raised, he fell to the ground." The receipt in evidence of these documents would have been violative of the hearsay rule and would have invited speculation and conjecture absent expert testimony in regard to same.

The inadmissibility of the death certificate was decided in two early decisions of this Court, the first being *Levy v. Vaughan*, 42 App. D.C. 146 (1914) and *District of Columbia v. Washington*, 44 App. D.C. 120 (1915). The content of the autopsy report was more obviously inadmissible.

CONCLUSION

In the trial court, Plaintiff contended, at time of Pretrial, as evidenced by the record herein, that Appellee, Anthony Izzo Co., Inc., was liable for the negligent operation of the hoist by Robert Lee Humphrey, the employee of Redding & Co., under the borrowed servant doctrine. The trial judge concluded that there was no evidence within the framework of applicable law to support such a contention and apparently, Appellant has abandoned such contention in this Court. The industrial safety regulations, referred to as a matter of stipulation between the parties and received in evidence in this case, were introduced by Appellant in connection with her claim against the general contractor, Redding & Co., Inc., only. The action of the trial judge in directing a verdict in favor of Appellee, Anthony Izzo Co., Inc., on the basis that Plaintiff's decedent was guilty of contributory negligence as a matter of law and/or that Plaintiff had failed to establish that any negligence on the part of Appellee, Anthony Izzo Co., Inc., caused the death of Plaintiff's decedent, should be affirmed.

Respectfully submitted,

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Attorneys for Appellee,
Anthony Izzo Co., Inc.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 23,932

Betty Joe Bowman,

Appellant

v.

Redding & Co., Inc.
and
Anthony Izzo Company, Inc.

Appellees

Appeal from the United States District Court
for the
District of Columbia

Petition For Rehearing and Suggestion For
Rehearing En Banc

Comes now the appellee, ANTHONY IZZO COMPANY, INC., by and through counsel and states as follows in support of its petition for rehearing and suggestion for rehearing en banc.

The judgment entered on February 16, 1971, is in irreconcilible conflict with innumerable prior decisions of this Court and reflects a serious misapprehension by the Court of the law and of the facts which should have governed this appeal.

More specifically, appellee respectfully directs the attention of this Honorable Court to those portions of the opinion relating to: (1) the last clear chance doctrine; (2) admissibility of the autopsy report; (3) shifting of the burden of proof; and (4) the presumption of continuing life.

Preliminarily, it must be noted that as to this appellee there was no allegation or evidence of a violation of the regulations of the District of Columbia Minimum Wage and Indstrial Safety Board and, therefore, that part of the Opinion relating to the effect of the violation of the Safety Regulation should have no bearing insofar as this appellee is concerned.

I. Section III of the Opinion found on page 10, 11 and 12 holds, in effect, that the appellant was entitled to invoke the doctrine of last clear chance, against this appellee and that, therefore, it was error for the trial judge to rule - as to this appellee - that the decedent was contributorily negligent as a matter of law. As will be shown, this holding is contrary to all prior case law in this jurisdiction on the doctrine of last clear chance. Further, it is difficult to comprehend how this issue can be resolved against appellee Izzo when it has been raised, for the first time, in the Decision of the Court of Appeals and appellee Izzo has had no opportunity to confront it either in the trial court or in the Court of Appeals. Appellant never contended that the doctrine of last clear chance was applicable to this appellee in either court. In her brief appellant, on page 14 states:

> "Assuming, arguendo, that decedent was contributorily negligent, the trial court erred in refusing to apply the last clear chance doctrine to the appellee, Redding and Co., Inc."

This Court has held on numerous occasions that an issue not raised in the trial court will not be entertained on appeal.

In Kanelos v. Kettler _____ U.S. App. D.C._____, 406 F. 2d 951 (1968) this Court held at p. 954:

> "Courts must, of course, conform their rulings to the law as they see it, irrespective of the deviating views and litigating courses of counsel. But this is not to say that a court may raise for the first time and simultaneously rule on a new point which the losing party has had no occasion to address with evidence."

Likewise, in Miller v. Avirom 127 U.S. App. D.C. 367, 384 F. 2d 319 (1967) this court stated at p. 369:

> "By our current appraisal the question appellant poses is sufficiently substantial to command serious attention if properly presented for our decision. But because the issue was neither raised nor decided in the District Court, we do no address it on this appeal or intimate any view as to how it should be resolved.
>
> "In our jurisprudential system, trial and appellate processes are synchronized in contemplation that review will normally be confined to matters appropriately submitted for determination in the court of first resort. Questions not properly raised and preserved during the proceedings under examination, and points not asserted with sufficient precision to indicate distinctly the party's thesis, would normally be spurned on appeal."

Also see Calhoun, v. Freeman 114 U.S. App. D.C. 385, (1963), 316 F. 2d 386 (1963); Brown v. Collins ___ U.S. App. D.C.____, 402 F. 2d 209 (1968) at p. 213; and Filmon Process Corp. v. Spell - Right Corp. _____ U.S. App. D. C. _____ , 404 F. 2d. 1351 (1968) at p. 1356.

Having asserted the doctrine of last clear chance against the appellee Redding and not against appellee Izzo it is obvious that the appellant recognized the doctrine had no application as to appellee Izzo as

is crystal clear from the cases from this jurisdiction and the annotation cited below.

The only evidence respecting the alleged negligence of appellee Izzo was summarized by the trial court in its opinion at J.A. 74-75:

> "There was evidence that it was the duty of Leonard Williams, laborer and employee of Izzo, to mix mortar, put in wheelbarrow, roll on hoist, and then signal employee of the defendant Redding, who would send the cage or mortar to the predesignated level. . . As the witness looked up and saw the cage come down around the eleventh floor, saw a man's legs hanging and the body bent over, he yelled for the operator to 'hold it.'
>
> The last engineer, Robert L. Humphrey of Redding, testified that the cage went up to the penthouse, twelth floor, signaled after unloading, three bells were sounded, cage started to move down when Williams saw a man, yelled 'hold it, raise it! He did immediately raise the cage up a little, up two-feet, 'dogged it off' by putting a latch in gear, and in seconds the man hit the ground."

As this was the only evidence of negligence of appellee Izzo, there can be no application of the doctrine of last clear chance for at the time of the alleged negligence of Izzo, the decedent was already very obviously - if not already wounded - in serious peril. There is nothing to suggest that appellee Izzo in any way contributed to decedent's perilous situation a long recognized prerequisite for the application of the doctrine as is demonstrated by the following quotations from decisions of this Court:

Dean v. Cantury Motors, 81 U.S. App. D.C. 9, 154 F. 2d 201 (1946) at p. 10:

> "In these circumstances, we see no proper place for an instruction on last clear chance. The doctrine presupposes a perilous situation created or existing through the negligence of both the plaintiff and the defendant. . . . (Emphasis added)

Capital Transit Co. v. Grines 82 U.S. App. D.C. 393, 164 F. 2d 718 (1947) at p. 393:

> "Only recently we stated that 'The doctrine presupposes a perilous situation created or existing through the negligence of both the plaintiff and the defendant. . .'"

Landfair v. Capital Transit Co., 83 U.S. App. D.C. 60, 165 F. 2d 255 (1948) at p. 62:

> "'The doctrine of (last clear chance) presupposes the perilous situation created of existing through the negligence of both the plaintiff and the defendant. . . .'"

Gay v. Augur, 97 U.S. App. D.C. 337, 231 F. 2d 495 at p. 337:

> "The doctrine of last clear chance applies, as this court has held several times, when, after the negligence and contributory negligence of the parties have placed one of them in a position of peril, the other has a reasonable opportunity to realize that peril and to avert the impending injury." (Emphasis added).

Richardson v. Gregory, 108 U.S. App. D.C. 263, 281 F. 2d 626 (1960) at p. 265:

> The last clear chance doctrine 'presupposes a perilous situation created of existing through the negligence of both the plaintiff and the defendant.'"

Mathews v. Lindsay, 108 U.S. App. D.C. 292, F. 2d 927 (1960) at p. 293:

> "The essential elements of the latter doctrine, (last clear chance) were in my opinion correctly stated by the District Court as follows: (1) that plaintiff was in a position of danger caused by negligence of both plaintiff and defendant. . . ." (Emphasis added)

Conlon v. Tennant, 110 U.S. App. D.C. 140, 289 F. 2d 881 (1961) at p. 141:

> "Application of the doctrine of last clear chance 'presupposes a perilous situation created or existing through the negligence of both the plaintiff and the defendant.. . ."'

By its decision the Court has reversed all of the above cases insofar as they define the prerequisites of the application of the doctrine of last clear chance because, in this case there was never even a suggestion that appellee Izzo had caused or contributed to decedents position of peril.

As stated by the District of Columbia Court of Appeals in Broderick v. Gletner, 249 A. 2d 738 (1969) at p. 739:

> "Plaintiff also argues that his case should have been submitted to the jury on the last clear chance doctrine, but this doctrine presupposes a perilous situation created by the negligence of both plaintiff and defendant, and, as we have held, there was no evidence that plaintiff's perilous situation was created by any negligent act of defendant."

As authority for its position the Court cited, at p. 11, annotations found at 92 A.L.R. 47 (1934) and at 171 A.L.R. 365 (1947). The latter annotation contains a very pertinent observation at p. 365:

> "Of special importance in the treatment of this subject is the point made and emphasized in the comment note, 92 A.L.R. 55, that the doctrine of last clear chance may not properly be invoked to raise a duty on the part of the defendant or to charge himwith negligence whether before or after the injured person came into a position of peril. Its only proper scope and function is to relieve the plaintiff from the consequences and effect of the general rule of contributory negligence, upon the assumption that he establishes independently a breach of duty on the part of the defendant which originated, or continued after the injured person's peril arose. That view of the doctrine in its distinctive scope and purpose is again emphasized since the courts not infrequently use language which implies that the question as to existence of such negligence on the part of the defendant is included in the doctrine."

If, as is abundantly clear, the Court was in error in holding the doctrine of last clear chance applicable as to appellee Izzo, then it must follow that there is no basis for the resulting holding that the trial

court could not find appellant contributory negligent as a matter of law. In other words, without the doctrine of last clear chance, and without any allegation of a violation of a safety regulation appellee Izzo would be perfectly free to plead decedent's contributory negligence and assumption of risk as a bar to this action. And, under the ruling of this Court in Neff v. United States, 136 U.S. App. D.C. 273, 420 F. 2d 115 (1969) at p. 275:

> "It is well established that 'contributory negligence may consist not only in a failure to discover or appreciate a risk which would be apparent to a reasonable man. . . . but also in an intentional exposure to a danger of which the plaintiff is aware.'" (Citations omitted).

There was overwhelming evidence to compel the trial court to find that the decedent was contributorily negligent as a matter of law. See Payne v. McDonald and Langsworth Co., 58 App. D.C. 155; Decatur v. Charles H. Tompkins Co., 58 App. D.C. 102; Fitzpatrick v. Fowler, 83 U.S. App. D.C. 299, 168 F. 2d 172 (1948); Green v. Pyne, 53 App. D.C. 271, 289 F. 929 (1923);

II. In its ruling that the trial court erred in excluding the autopsy report, the Court stated at pages 7 and 8:

> "Appellant attempted to introduce into evidence, the autopsy report and death certificate, which, appellant claims, showed no injuries that could be attributable to Bowman's having been pinned.
>
> * * *
>
> In the present case, the rejected autopsy report and death certificate's history of how the fall occurred are inadmissable under Levy, since they apparently rested on hearsay. But the autopsy report's 'anatomical diagnosis' was not inadmissable, since it was based on direct examination of the deceased. It would be relevant to the question of the cause of death, which is a matter for jury determination when in doubt."

From that language it is clear that the Court has accepted appellant's representations that the excluded report would be relevant to the question of the cause of death. The issue was, of course, whether decedent died as a result of being pinned at the waist between the cage and the edge of the platform or as a result of his fall to the ground. An examination of the excluded exhibit clearly shows that, standing alone, it was of no probative value in resolving that issue. The "anatomical diagnosis" was as consistent with one theory as the other. This was clearly stated by the trial judge in his opinion where he said:

> "In the course of plaintif's argument in opposition to Motion for Directed Verdict, counsel mentioned that the Court, on objection of defendant's counsel, refused to receive autopsy report and certificate of death. To the extent that these documents were legally usuable, on objection of opposing counsel, all the facts therein were already in evidence by stipulation or otherwise. There was no challenge to the fact that the decedent was pinned and that, when the cage was raised, he fell to the ground.
>
> There was no proffer of evidence interpreting the autopsy report and death certificate which would show (1121) whether the injuries which resulted in death were attributable to pinning or to the fall." (J.A. 75)

Reference to the autopsy report (J.A. 78) demonstrates the absolute validity of the course of action followed by the trial court:

> "Anatomical Diagnosis:
>
> Fracture dislocation of cervical spine
> Multiple rib fractures
> Fractured liver and spleen
> Hemothorax (Right)
> Fractured pelvis
> Fractured right femur."

How this "anatomical diagnosis" which the Court has now said was erroneously excluded, could have assisted the jury in determining whether

decedent died as a result of his fall or being pinned is beyond comprehension.

In its decision on this point, the Court relied on language from Labofish v. Berman, 60 App. D.C. 397, 55 F. 2d 1022 and New York Life Insurance Co., v. Miller, 65 App. D.C. 129 81 F. 2d 263. In those cases when the Court referred to "cause of death" it was clearly referring to the "pathological" or "medical" cause of death. In this case the autopsy report was not tendered to show the "medical" cause of death as that was not in dispute. It was rather to show the circumstances of how decedent's injuries were sustained i.e., whether from fall or from bring pinned and, as shown, this the exhibit, standing alone, could not do.

III. In part V of the Opinion, beginning on page 20, the Court adopts as a "rule" that:

> "On a showing of negligence by each of two (or more) defendants with uncertainty as to which caused the harm does not defeat recovery but passes the burden to the tortifeasors for each to prove, if he can, that he did not cause the harm."

To cite here the numerous decisions of this Court relating to proximate cause which are overturned by the adoption of this rule would serve no purpose. The magnitude of this holding and its conflict with the long established and recognized decisional law of the District of Columbia as too obvious to warrant further comment other than to suggest it is a matter of sufficient importance to warrant a rehearing en banc.

IV. Presumption of Continuing Life

The Court, in its Opinion, "concluded that this case is governed by the general guiding principle that a plaintiff's claim that his decedent's life continuted, until terminated as a result of defendant's negligence, presents

a question for the jury. The principle is undergirded by the more broadly applicable doctrine that in cases where the time of death is uncertain, there is a presumption of continuance of life." The Court has failed to appreciate the frailty of the presumption of continuance of life and the slight proof and/or circumstances which are sufficient to overcome this presumption. As stated in 29 Am. Jur. 2d Evid. Sec. 161 "A presumption of fact - which is the same as, or akin to, an inference - is a logical and reasonable conclusion of the existence of a fact in a case, not presented by direct evidence as to the existence of the fact itself, but inferred from the establishment of other facts from which, by the process of logic and reason, based upon human experience, the existence of the assumed fact may be concluded by the trier of the fact. . . . A presumption of this kind arises from the commonly accepted experiences of mankind and the inferrences which reasonable men would draw from experiences. * * * An inference cannot be based on conjecture or surmise, or a premise which is wholly uncertain."

In this case it is undisputable that the decedent was in very grave peril and may well have expired prior to his fall. This was appreciated by the Court in Occidental Life Insurance Co. v. Thomas 107 F. 2d 876 (C.A. 9, 1969) where it stated at p. 878:

> "Two settled principles applicable to a case of this nature are: - that a person who was alive when last seen is presumed to continue living until the contrary is shown and that one who disappears and remains unheard of for seven years, and whose absence is unexplained, is presumed to be dead. Where the proof shows that the absentee encountered some specific peril to which it may reasonably be thought he had succumbed, death may be inferred short of the expiration of the seven-year period."

In one of the cases quoted by this Court, American Sugar Refining Co., v. Ned, 209 F. 2d 636 (5th Cir.) the decedent was alive when he fell into the water and the cause of death as noted on his death certificate was "asphyxis due to drowning." Quite logically the Court there rejected appellant's proposition that decedent died of a disease and instead ruled that there was a presumption in favor of the continuation of life until the contrary was shown. There was no credible evidence in that case suggesting plaintiff was in serious peril prior to falling into the water. As additional authority, this Court has also cited the decision of the Court of Claims in Acosta v. United States, 320 F. 2 382 and quoted from that decision at p. 9 of the Opinion. However, immediately before the language quoted, the Court of Claims had stated, "On the other hand there is little showing of a distinct peril or danger encountered after the disappearance." It was only after making that observation that the Court applied the "federal rule." Appellee Izzo submits there is no prior case holding the presumption of continued life extends beyond the time the party "encountered some specific peril to which it may reasonably be thought he had succumbed," and that is precisely the holding of this Court.

Wherefore, petitioner respectfully requests that this Court grant it a rehearing, and suggests a rehaaring en banc as the decision of this Court clearly reflects a misapprehension of the law and of the facts which should have governed its decision. The decision, as shown, is in serious conflict with prior decisions of this Court on many important legal issues.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,932

BETTY JOE BOWMAN,

Appellant

v.

REDDING & CO., INC.
and
ANTHONY IZZO COMPANY, INC.

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

CERTIFICATE OF SERVICE

I hereby certify that service of a copy of the Petition for Rehearing and Suggestion for Rehearing En Banc has been mailed this 16th day of March, 1971, to Walter S. Furlow, Jr., Esq., Attorney for the Appellant, 1629 K Street, N. W., Washington, D. C. and to Leonard C. Greenebaum, Esq., Attorney for Appellee Redding & Company, Inc., 839 17th Street, N. W., Washington, D. C.

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